Supreme Court of the United States.

THE SOUTHERN EXPRESS COMPANY,
Appellee,

vs.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Appellant.

No. 914.

MOTION TO DISMISS APPEAL,

AND

PETITION AND BRIEF

IN SUPPORT THEREOF.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Of Counsel for the Motion.

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INDEX.

	PAGE
Motion in this Court	1
Petition	2
Prayers of Bill	3, 4
Averments on which same are founded	4, 5
Temporary Injunction	7
Answer	5, 6, 7
Opinion of Court below	9
Continuance of Injunction	12
Opening of March Term, 1882	13
Decree, March 25	13
Petition of Appeal	16
Allowance of Appeal	17
Approval of Bond	17
Petition of Plaintiff of June 3, 1882	18
Modification of Decree on June 5, 1882	24
Adjournment of March Term	27
Notice of Motion to Appellant's Counsel	29
Proof of Service of Motion Papers and Brief	29
Brief	30

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vs.

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Appellant.

No. 914.

And now comes the appellee, and respectfully moves the Court, upon the petition hereto annexed, to dismiss the appeal herein, upon the following grounds:

I.—This Court has no jurisdiction of such appeal.

II.—The decree appealed from was and is not final.

III.—The decree appealed from was and is interlocutory or provisional only.

IV.—The decree appealed from does not decide all the issues between the parties, or those raised by the pleadings, and as to which the larger portion of the evidence contained in the transcript was addressed.

V.—The decree appealed from on its face leaves such issues pending and undetermined in the Circuit Court, which is proceeding to determine the same.

VI.—The appeal was taken before the end of the term at which such decree was pronounced.

VII.—Such decree was modified by the Circuit Court at the same term at which it was pronounced by a further interlocutory or provisional decree, under which proceedings are still pending in said Circuit Court.

VIII.—The said appeal was and is premature.

November , 1882.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

THE SOUTHERN EXPRESS COMPANY,
Appellee,
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Appellant.
No. 914.

To the Supreme Court of the United States:

The petition of the Southern Express Company, appellee herein, respectfully represents:

I.—The transcript from the Clerk's Office of the Circuit Court of the United States for the Eastern District of Missouri has been filed herein, and as so filed contains over 1,880 printed and manuscript pages, the major portion of which contains printed copies of the depositions of witnesses called to support various issues between the parties, and raised by the pleadings.

II.—It appears from the bill in such transcript that heretofore and prior to the 26th day of March, 1880, the Southern Express Company had been and was then in the enjoyment of all the usual express facilities upon the defendant's railway, under two written contracts in said bill set forth, wherein such facilities are particularly described, and wherein a stipulated compensation was nominated and agreed to be paid therefor.

III.—It in like manner further appears that on the 26th of March, and on the 23d of April, 1880, the railway company notified the express company that such contracts would be terminated on and after a given date, and that on the 15th of May, 1880, the railway company notified the express company that the railway "company had determined to transport all express matter, and transact all express business on its own account, and through and by its own officers and agents, on and after the 1st day of June next, in its own cars and over its own roads."

IV.—It in like manner further appears that the bill herein was filed on the 21st of May, 1880. It prayed in substance, that the railway company might be restrained during the pendency of the suit, by a preliminary injunction, from interfering with or disturbing the business of the express company, from excluding or ejecting any of its express matter or messengers from the depots, cars, or lines of the said defendant, as the same had been theretofore enjoyed and occupied by the express company, and from refusing to receive and transport, in like manner as the defendant was then doing, such express matter and messengers, so long as the express company should be willing and ready, and offer to pay according to legal rates therefor. The said bill also specifically prayed as follows:

"2. That if any dispute or disagreement shall arise between the parties hereto, during the pendency of this suit and before a final decree herein, upon the question of what is a lawful or reasonable compensation to be paid by your orator to the defendant, for the transportation of express matter, your orator may be permitted to bring the same by way of interlocutory application to this Court for its decision, and that, pending the enquiry thereon, the preliminary injunction heretofore prayed, may be continued to the same purport, tenor and effect, as if the prayer for the same were here repeated.

3. That the said defendant may be decreed by this Court to transport at all times the express matter, safes and messengers of the said Southern Express Company, by the same trains and with the same accommodations thereon, and in its depots and stations, as it may transport its own express matter, or as it may accord to itself; and that the said defendant may be decreed so to transport said express matter, safes, and messengers of the said Southern Express Company, at and for the statutory tolls and compensation in that behalf by law provided, and that the said defendant may be decreed to make a reasonable rebate or reduction, to be fixed and determined by this Honorable Court, from its charges to the said Southern Express Company, by reason of its performance of said accessorial service, as above specified, so long as the said Southern Express Company shall offer to conform to all the reasonable rules and regulations of the said defendant, and to pay all lawful charges for the transaction of its said business."

The said two prayers were founded among other things upon the following allegations in said bill:

XLV.—And your orator further avers that the said railroad companies have classified railway freight according to law, and that the rates of toll or compensation therefor have been provided by law, and that the same cannot be lawfully exceeded by said defendant in its charges to your orator, or to the public whom your orator represents.

XLVI.—And your orator further avers, as it has hereinbefore averred, that it is now in the daily custom of making with its own horses and wagons which it now possesses, and under drivers for whose fidelity it is responsible, all the collections and deliveries of express freight as between the public and the railway lines of the said defendant, which the public cannot conveniently make on its own behalf, and that it does not require from the said defendant any similar service, nor, as it is advised and believes, can the said defendant lawfully charge it therefor.

XLVIII.—And your orator further avers * * * that it will be entitled to have all its express matter transported over the lines of the said defendant's railway at the rates of freight or toll specifically provided by law and by the charter of the said defendant and by the railroad commissioners, * * * and that in any event if the said defendant shall, during the pendency of this suit or hereafter, undertake to do and do its own express business, the said defendant can be legally required to deduct from the charges to be made by it to the public for the transportation of express matter upon all express matter transported by it for the said Southern Express Company, a just and reasonable compensation for the accessorial services rendered by

the said Southern Express Company beyond and off the lines of railway of the said defendant in the collection of goods from shippers or consignors and the delivery of goods to consignees by means of horses and wagons, and which accessorial service the said Southern Express Company does not require or need at the hands of the said defendant, but is now performing and rendering for itself, as is hereinbefore set forth.

XLIX.—This plaintiff further, in the event that the said defendant, during the pendency of this suit, undertakes to conduct, and does conduct for itself the express business over its said lines of railway * * * * is willing and ready, and hereby offers to pay all the reasonable freight or tolls which the said defendant railway company may lawfully demand for the transportation of express matter, as aforesaid.

V.—A temporary restraining order was granted on the filing of the bill on the 21st day of May, 1880, returnable on the 1st day of June, 1880, on which day, as appears by said transcript, the following order was made:

"The motion of the complainant for a preliminary injunction herein, according to the prayer of the bill, having been brought on to be heard, and the parties being present by their counsel, and the Court having duly considered the questions presented, after argument for the defendant as well as for the plaintiff, doth hereby order that the defendant, its officers, agents, servants, and employees, be enjoined and restrained, until the final determination of this cause, from preventing the plaintiff's enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself, on payment by the plaintiff of reasonable compensation therefor."

VI.—The defendant duly answered said bill, and in such answer as set out in said transcript, stated, among other things, as follows:

"Defendant, as to the statements contained in paragraph 43 of complainant's bill, denies that it is the duty of the defendant to continue to afford to complainant, upon its passenger trains and at its depots and stations, the same facilities which it has heretofore accorded, or which it may hereafter accord to itself; denies that, under the laws of the State of Missouri, the defendant has no lawful power to arrogate to itself the exclusive right of conducting the express business over its lines of railway, or to exclude other express companies from participating therein, or to charge such other express companies such express rates as the said defendant may see fit to adopt. Denies that defend-

ant, by the laws of said State of Missouri, is compellable to receive all passengers and express freight from connecting or intersecting roads, whenever the same shall be delivered to it, and to take, transport and deliver the same without unnecessary delay, and for such charges and without any discrimination whether it shall transport such freight in its own name or in the name of another, and for such toll or compensation therefor as is specifically provided by law, or by the railroad commissioners appointed by law, and annually to transmit to said commissioners a report under oath showing, among other things, what express companies ran on its road, and on what terms and conditions, and the kind of business done by them.

27. As to the statements contained in paragraph 45 of complainant's bill, defendant admits that the railroad companies have classified railway freight, and that the rate of toll or compensation therefor has been provided by law, but denies that the same cannot be lawfully exceeded by the defendant in its charges to complainant or to the public. * * * * * *

30. As to the statements contained in paragraph 48 of complainant's bill, defendant denies that complainant is entitled to demand and receive from defendant the same facilities and accommodations for transacting the express business over the lines of defendant's railway, as may be accorded by said defendant to itself. Denies that it is entitled to have all its express matter transported over the lines of the defendant's railway at rates of freight or toll specifically provided by law, and by the charter of defendant, and by the said railroad commissioners, and upon the same trains, and with like accommodation thereon, and at depots and stations, as the defendant may accord to itself in the transportation of such express matter as it may carry. Denies that the defendant, in doing its own express business, can be lawfully required to deduct from the charges to be made by it to the public for the transportation of express matter, upon all express matter transported by it for the said Southern Express Company, a just and reasonable compensation for the accessorial service rendered by the Southern Express Company beyond and off the lines of railway of defendant, in the collection of goods from shippers or consignors, or the delivery of goods to consignees by means of horses and wagons.

31. Defendant states that under its charter of incorporation, which was duly granted under and pursuant to the laws of the State of Missouri, on the 3d day of March, 1851, it is authorized to transport passengers, goods, wares and merchandise of all kinds, and also all kinds of lumber, produce, and other articles usually transported on railroads, and to charge and receive such tolls and freights for transportation of persons and commodities on said road, or any parts thereof, as shall be to the interest of the same, and that the directors of the defendant are therein authorized to establish such tolls, and to alter the same from time to time.

32. Defendant further avers that, while it has always claimed the right under the provisions of its said charter to transport what is usually called express matter, and to do a general express business upon and over its own lines, for reasons satisfactory at the time it made the contracts set out in paragraphs 11 and 12 of complainant's bill, under and by virtue of which the said Adams Express Company, and the said Southern Express Company in its own right, and as the successor of said Adams Express Company, transacted the said express business over the lines of the defendant until about the first day of June, 1880, when the said contracts were terminated by notice duly given, in accordance with the terms and provisions of said contracts.

33. Defendant further avers that since the said first day of June, 1880, the defendants have formed and organized what is known as the "Express Department of the St. Louis, Iron Mountain and Southern Railway Company," and has been and is now doing a general express business on its own lines."

VII.—After the 1st day of June, 1880, on which the defendant so commenced to conduct the express business on its own behalf, and on which the preliminary injunction was so as aforesaid issued, the Southern Express Company continued under the protection of said order to conduct its express business over the defendant's line, and has since continued to conduct, and is now so engaged in conducting the same and in competition with the defendant express.

VIII.—Since the contract between the parties was so as aforesaid terminated, and the defendant commenced to conduct its own express business, no rate or other mode of compensation has been agreed upon or existed between the parties fixing or determining the quantum of compensation to be paid by the Southern Express Company for the facilities enjoyed by it.

IX.—A replication was duly filed to the answer and is contained in the transcript, and thereafter the parties severally proceeded to take the testimony set forth in the transcript, as aforesaid.

X.—Pending these proceedings, and as appears by the transcript, a dispute arose between the parties as to the privileges to be enjoyed by the Express Company under the

preliminary injunction, and as to the compensation to be paid therefor, which being called to the attention of the Circuit Court, it made on the 6th day of November, 1880, a further order, in these words:

"The petition of the plaintiff for a modification of the provisional order of injunction heretofore made having been presented to the Court, together with the answer thereto, and the affidavits and counter affidavits, and the respective solicitors having been fully heard in the premises, it is ordered that the provisional injunction heretofore made in this case be modified so that the same may read as follows:

The defendants, its agents, employees, and servants, are hereby enjoined, until the final determination of this suit, from preventing the plaintiff from enjoying equal facilities in the conduct of its express business with those permitted to other express companies, or exercised by the defendant itself with respect to said business, on payment by the plaintiff of reasonable compensation for such services as may be rendered in this behalf by the defendants. And it is further ordered that the defendant be enjoined from including, under the term 'reasonable compensation,' any accessorial charges, and from making any discrimination against the plaintiff for return of empty kegs or packages, and from charging the plaintiff higher rates of freight than are charged against other express companies, and than it exacts for the service of its own express department—the said rates as to the plaintiff not to exceed those now established by the defendant for like services of other parties, or for the conduct of its own express department. It is further ordered that the defendant be enjoined from preventing the transportation of express matter by the plaintiff over defendants roads, and from requiring, as a pre-requisite or condition for such transportation, the listing or disclosure by the plaintiff of the contents of the packages by the plaintiff presented to the defendant for transportation, and from preventing the messengers of the plaintiff, on payment of the passenger fare, from like accommodations for the care and custody of plaintiff's shipments, as are accorded to messengers of other express companies, or the agents, servants, or employees of the defendant engaged in like service."

XI.—The cause, in connection with other similar ones, was argued on the pleadings and proofs at St. Louis, on the 7th, 8th and 9th days of February, 1882, before the full Bench, composed of Associate Justice MILLER, MCCRARY, *C. J.*, and TREAT, *D. J.*

The opinion of the Court was pronounced on the 21st of February, 1882, by Mr. Justice MILLER, and is set out in the transcript in these words:

"IN THE CIRCUIT COURT OF THE UNITED STATES,

EIGHTH CIRCUIT.

WILLIAM B. DINSMORE, Pres. Adams Express Co., &c., *vs.* THE MISSOURI, KANSAS & TEXAS RAILWAY CO.	*District of Kansas.*
SAME *vs.* THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.	*District of Kansas.*
SAME *vs.* THE DENVER & RIO GRANDE RAILWAY COMPANY.	*District of Colorado.*
THE SOUTHERN EXPRESS CO. *vs.* THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.	*Eastern District of Missouri.*
THE SOUTHERN EXPRESS CO. *vs.* THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY.	*Eastern District of Arkansas.*

MILLER, *Circuit Justice:*

In these cases, argued before me at St. Louis, with Judges McCrary and Treat, I can do no more than present certain general conclusions

at which my mind has arrived in regard to the propositions argued by counsel:

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the Court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is

shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the Courts to decide.

7. I am of the opinion that a court of equity in a case properly made out has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

8. While I doubt the right of the Court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the Court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the Court at stated intervals, and claim an addition to, or rebate from, the amount so paid.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, &c.

12. I am of opinion that neither the statutes, nor constitutions of Arkansas or Missouri, were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies."

XII.—On the same 21st day of February, 1882, as appears by the transcript, a further order was made by the Circuit Court in said cause in these words:

"IN THE CIRCUIT COURT OF THE UNITED STATES,

EIGHTH CIRCUIT—EASTERN DISTRICT OF MISSOURI.

THE SOUTHERN EXPRESS COMPANY

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

In this case it is ordered that the injunction hereinbefore granted shall remain in force until otherwise ordered by the Court. Counsel will be heard at a convenient time upon the question of the form of a decree to be entered herein in pursuance of the opinion of the Court announced by Mr. Justice Miller, and herewith filed.

GEO. W. McCRARY,

February 21, 1882. *Circuit Judge.*"

XIII.—The regular terms of the Circuit Court for the Eastern District of Missouri are appointed by law (*U. S. R. S., Sec.* 658) to be held at St. Louis on the third Mondays in March and September. The third Monday of March, 1882, occurred on the 20th day of March, 1882. The said Circuit Court convened on said designated day as appears by an entry in its records of which a certified copy is herewith filed, and which copy is in the words and figures following:

"Be it remembered that on the 20th day of March, 1882, the following appears of record in said Court, to wit:

March 20, 1882.

United States of America, *Eastern District of Missouri,* } ss. :

IN THE CIRCUIT COURT OF THE UNITED STATES,

In and for the Eastern District of Missouri.

March Term, 1882.

Monday, March 20, 1882.

At a Circuit Court of the United States, in and for the Eastern District of Missouri, begun and holden at the City of St. Louis, in and for said District, on the third Monday, the twentieth day of March, 1882.

Present—Hon. George W. McCrary, Judge of the Circuit Court of the United States for the Eighth Judicial Circuit.
Hon. Samuel Treat, Judge of the District Court of the United States for the Eastern District of Missouri.
William H. Bliss, Esq., United States Attorney.
Felix Coste, Esq., United States Marshal ; and
M. M. Price, Clerk."

XIV.—At the said March Term, and on the 25th day of March, 1882, the said Circuit Court entered its decree in said cause, and which is the decree appealed from herein, and which, as appears by said transcript, was in the words following:

The Southern Express Company

vs.

The St. Louis, Iron Mountain and Southern Railway Company.

And now this day come the parties aforesaid, and by their counsel then and there present, bring on this cause to be heard on the pleadings and proofs, and the same were then and there presented to the Court, and the argument of counsel for the respective parties is heard, and the said cause is then and there submitted, and due deliberation having been thereupon had,

It is by the Court ordered, adjudged and decreed, as follows :

I.—That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, became known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

II.—That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

III.—That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which is has to be carried, and to deny them the right to the custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV.—That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

V.—That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

VI.—That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth ; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn ; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880 ; that such intention

purpose were restrained by the preliminary injunction order of Court, which said injunction order was afterwards modified, as ears in the record.

VII.—That it is the duty of the defendant to afford to the plaintiff express facilities, and to the same extent, and upon the same trains t said defendant accord to itself or to any other company or corpo-ion engaged in the conduct of an express business on the defend-'s lines, and to afford the same facilities to plaintiff on all its pas-ger trains.

VIII.—That the plaintiff keep and render monthly a true account of e services performed for it by the defendant, and to pay therefor at e rate hereinafter specified on or before the 15th of each month after e date hereof for the business of the month preceding, and that the fendant has no right to require prepayment for said express facili-s, or payment thereof at the end of every train or in any other nner than as is hereinafter provided ; and that plaintiff execute and liver to the defendant a bond in the sum of one hundred and fifty ousand dollars ($150,000), conditioned well and faithfully to make ch payments as is herein provided, and with surety to be approved a Judge of the Court.

IX.—That it is and was the duty of the said defendant to afford d to have afforded such facilities to the plaintiff herein specified for just and reasonable compensation.

X.—Whereas, it is alleged by complainant that since the commence-ent of this suit and the service of the preliminary order of injunction rein, the defendant has, in violation of said injunction and of the ghts of complainant, made unjust discriminations against com-lainant, and has charged complainant unjust and unreasonable rates r carrying express matter, therefore it is ordered that complainant ave leave hereafter to apply for an investigation of these and similar legations, and for such order with respect thereto as the facts, when scertained, may justify, and for the appointment of a Master to take roof and report thereon.

XI.—That the defendant, its officers, agents, servants and employees, nd all persons acting under their authority, be, and they hereby are, ermanently and perpetually enjoined and restrained from interfering ith or disturbing in any manner the enjoyment by the plaintiff of he facilities provided for in this decree, to be accorded to it by the aid defendant upon its lines of railway, or such as have been hereto-ore accorded to it for the transaction of the business of the plaintiff nd of the express business of the public confided to its care, and from

It is by the Court ordered, adjudged and decreed, as follows :

I.—That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, became known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

II.—That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

III.—That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which is has to be carried, and to deny them the right to the custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV.—That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

V.—That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

VI.—That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth ; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn ; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880 ; that such intention

and purpose were restrained by the preliminary injunction order of the Court, which said injunction order was afterwards modified, as appears in the record.

VII.—That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent, and upon the same trains that said defendant accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

VIII.—That the plaintiff keep and render monthly a true account of the services performed for it by the defendant, and to pay therefor at the rate hereinafter specified on or before the 15th of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment thereof at the end of every train or in any other manner than as is hereinafter provided ; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as is herein provided, and with surety to be approved by a Judge of the Court.

IX.—That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff herein specified for a just and reasonable compensation.

X.—Whereas, it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon.

XI.—That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff and of the express business of the public confided to its care, and from

interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant, monthly as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates, for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals; reserving to either party a right at any time hereafter to apply to this Court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

It is further ordered, adjudged and decreed, that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor."

XV.—And on the 29th day of March, 1882, to wit, at the said March Term, the following further proceedings, as appears by said transcript, were had and appear of record in said cause:

"UNITED STATES CIRCUIT COURT,

FOR THE EASTERN DISTRICT OF MISSOURI.

SOUTHERN EXPRESS COMPANY

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Now comes the defendant by its solicitors, and objects and excepts to the decree entered in this cause, and each and every part thereof. And this defendant conceiving itself greatly aggrieved by this decree, and each and every part thereof, prays the Court to allow it an appeal therefrom to the Supreme Court of the United States, and that a full and complete transcript of the record in this cause, together with copies

of the proofs, and of such entries and papers on file as may be necessary on the appeal, be transmitted with all convenient despatch to the said Supreme Court.

THOS. J. PORTIS,
Solr. for Defendant.

March 29th, 1882.

I hereby certify that, in my opinion, there is good cause for appeal in the above stated cause.

THOS. J. PORTIS.

SOUTHERN EXPRESS COMPANY,
Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Defendant.

Now comes the defendant by its solicitors, and objecting and excepting to the decree entered herein, prays an appeal from the decree of this Court to the Supreme Court of the United States, and thereupon it is ordered that, on said defendant's filing a good and sufficient bond, in the sum of one thousand dollars, said appeal be allowed as prayed."

XVI.—And afterwards, to wit, on the 15th day of May, 1882, the following further proceedings as appears by said transcript were had and appear of record in said cause, to wit:

"SOUTHERN EXPRESS COMPANY,
Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Defendant.

Now comes the defendant by its solicitor, and presents to the Court its appeal bond herein in the sum of one thousand dollars, which is by the Court approved and ordered to be filed. It is further ordered that the Clerk of this Court make up a complete transcript of the record and proceedings in this cause and transmit the same to the Supreme Court of the United States on or before the second Monday of October next."

XVII.—At the same March Term of 1882, to wit, on the 3d day of June, 1882, the Express Company, as appears by the certified copy herewith filed, presented its petition to the said Circuit Court in the words and figures following, to wit:

"In the Circuit Court of the United States, Eastern District of Missouri.—In Equity—March Term, 1882.—The Southern Express Company, a corporation and a citizen of the State of Georgia, complainant, *vs.* The St. Louis, Iron Mountain and Southern Railway Company, a corporation and a citizen of the State of Missouri, defendant.

In the matter of the reference authorized by the decree of the Court in the above-mentioned cause, entered at the present Term of the Court, and on the 25th day of March, 1882.

To the Hon. Judges of the Circuit Court of the United States, for the Eastern District of Missouri. In Equity:

(1.) The said Southern Express Company, your petitioner, respectfully states, that it was, and is, the plaintiff in the above entitled cause, and filed its original bill therein on the 21st day of May, 1880.

(2.) That in and by said bill it averred and set forth its existence as a corporation and citizen of the State of Georgia, and the existence of the defendant as a corporation and a citizen of the State of Missouri, and that both said plaintiff and defendant were common carriers as particularly mentioned in said bill, which is here referred to as part of this petition.

(3.) That in said bill it was stated that plaintiff had, for several years previous to the filing thereof, enjoyed the privileges and franchises of its charter as an express carrier over the road of defendant, and desired a continuance of such enjoyment.

(4.) But that the said defendant had notified plaintiff that after May 26th, 1880, it should not continue its business on said road.

(5.) That afterwards, May 15th, 1880, the defendant notified your petitioner that it had "determined to transport all express matter and transact all express business over said road itself, and on its own account, and through and by its own officers and agents on and after the first day of June, 1880."

(6.) And said plaintiff, in its said bill, further stated it was informed and believed, that the said Railroad Company intended to exclude it and its express safes and messengers from said railroad, and refuse to accord to it, after said June 1st, 1880, any facilities or accommodations for its express business, and that such exclusion would take place unless restrained by order of the Court; and that if it did take place the plaintiff's business over said railroad would be not only irreparably injured, but absolutely destroyed; that its customers and patrons would be lost, its good will and investment rendered worthless, and its ability

to keep its contracts with other railway and express companies terminated, and its usefulness to the public, as its servant, destroyed.

(7.) That the plaintiff averred further in its said bill that it was its daily custom to make, with its own horses and wagons and drivers, for whose fidelity it was responsible, all the collections and deliveries of express freight as between the public and the railroad of defendant, which the public could not conveniently make on its behalf, and did not require from defendant, and for which the defendant had no lawful right to charge.

(8.) And said plaintiff further averred in its said bill, that it was lawfully entitled to demand and receive from defendant the same facilities and accommodations for transacting the express business over its lines, as might be accorded by defendant to itself, and to have its express matter transported by defendant at rates or tolls specifically provided by law and the charter of defendant and the Railroad Commissioners, and on the same trains and with like accommodations at the depots and stations, which defendant might accord to itself in the transportation of express matter by it, and for reasonable compensation. And in the event that defendant should, during the pendency of said suit, or afterwards, undertake to do an express business of its own, it should deduct from charges made by it for transportation of express matter for the plaintiff, a just and reasonable compensation for the accessorial service rendered by plaintiff beyond and off the lines of said railroad in the collection of goods from shippers or consignors, and delivering to consignees by means of horses and wagons, &c., and which service the plaintiff did not need or require to be done by defendant, but performed for itself. And said plaintiff offered in said bill to pay to defendant, lawful and reasonable rates in its business, and to comply with all reasonable rules of defendant in that behalf.

(9.) And in said bill the plaintiff prayed the Court to enjoin the defendant, its officers, agents, servants and employees, until the further order of the Court, from interfering with or disturbing the enjoyment by plaintiff of the facilities then accorded to it in the transaction of its business; from interfering with any of plaintiff's express matter or messengers; from excluding or ejecting any of its express matter or messengers from the depots, cars, or lines of defendant's road, then enjoyed and occupied by it; from refusing to receive and transport plaintiff's express matter and messengers, as it was then doing, and from disturbing the existing business relations between said plaintiff and defendant.

(10.) That on the hearing of the plaintiff's motion for a preliminary injunction therein, the Court, after argument for defendant as well as plaintiff, did then and there "order that the defendant, its officers, agents, servants and employees be enjoined and restrained until the final determination of said cause, from preventing the plain-

tiff's enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself, on payment by plaintiff of reasonable compensation therefor." And defendant then and there had notice thereof.

(11.) That afterwards, on the 21st day of July, 1880, the said defendant filed its answer to said bill, and thereby denied that it was its duty to accord to plaintiff any facilities previously allowed to it on its passenger trains, or at its stations or depots, or such facilities as it accorded to itself; claimed an exclusive right in itself to do all express business over its road, and to exclude plaintiff and all other express carriers from its road, and a right to charge and collect any rate it saw fit; denied that it was bound to receive and transfer freights and passengers from connecting or intersecting railroads; denied that it was bound to make a reasonable deduction for service rendered by the plaintiff and not by itself, to shipments off of its road, from its charge against like shipments when it rendered the same service; and denied the right of plaintiff to have any space on its cars for carrying its express matter, or to carry such matter in the charge of plaintiff's employees, or to have its messengers ride in defendant's cars in charge of its express matter.

(12.) That afterwards, on the ——— day of ——————— the plaintiff filed its general replication to said answer, and afterwards the said parties took and placed on file a large amonnt of testimony therein, both oral and written, to be read on the hearing thereof.

(13.) That, on November 6th, 1880, the Court, on the motion of plaintiff, modified the said preliminary injunction so as to read as follows (being the same order of the 6th of November, hereinbefore set forth).

(14.) Your petitioner further states that afterwards—viz.: March 25th, 1882—such proceedings were had in said cause that the same came on to be heard, and was heard, and thereupon the Court entered therein its decree, in the words and figures following, viz.: (being the same decree of the 25th March, 1882, hereinbefore set forth.)

All of which, among other things therein, reference being had to the record and proceedings in said cause, will more fully and at large appear.

(15.) Your petitioner now here respectfully prays the Court to grant to it the benefit of the reference authorized by Sections V. and X. of said decree so entered in said cause, March 25th, 1882.

(16.) Your petitioner respectfully states, that after the making of said orders of injunction by the Court, and notice thereof to the defendant, and during the pendency of said bill, the said defendant refused to carry any express matter of said plaintiff on its railroad cars and trains, at a just and reasonable or legal rate of compensation

therefor, but demanded and exacted from plaintiff, and required it to pay, as a condition precedent to such transportation, excessive, exorbitant, unreasonable and illegal rates ; and plaintiff did pay such excessive, exorbitant, unreasonable and illegal rates, to its great wrong and injury.

(2.) That during the whole period last mentioned the said defendant refused to carry the plaintiff's messengers in charge of its express matter on its railway cars and trains at a just and reasonable or legal rate of compensation ; but demanded and exacted from the plaintiff, and compelled plaintiff to pay, and plaintiff did pay, as a precedent condition to the transportation of such messengers in charge of plaintiff's express matter, excessive, exorbitant, unreasonable and illegal rates of compensation therefor, to its great wrong and injury.

(3.) That during the whole period aforesaid, the said defendant discriminated against the plaintiff in respect to its charges for transportation of the plaintiff's messengers in charge of its express matter on defendant's railway cars and trains, denying to plaintiff's messengers the same accommodations extended by it to its own messengers and to others, charging plaintiff for the transportation of its messengers as aforesaid, higher rates for transportation than it charged its own and others, and compelled plaintiff to pay the same as a precedent condition of such transportation, to its great wrong and injury.

(4.) That during the whole period aforesaid, the defendant unjustly discriminated against plaintiff in this : that it carried express matter for itself and others at less rates than it demanded from plaintiff, and compelled plaintiff to pay, for like service, to its great wrong and injury.

(5.) That during the whole period aforesaid, the said defendant unjustly discriminated against the plaintiff in this : that it included in its charges against plaintiff for transportation of its express matter, and compelled the plaintiff to pay to it, compensation for accessorial service to shipments of express matter off and beyond its railroad cars and trains, not rendered by defendant, but in fact rendered by plaintiff, and just as if defendant had rendered said service, to the great wrong and injury of the plaintiff.

(6.) Your petitioner states that from and after the——day of———, 1881, and down to March 25th, 1882, the defendant unjustly discriminated against the plaintiff in this ; that it refused to allow plaintiff to do its express business over all its trains and express cars, and suffered the plaintiff to do its business only on some of its trains and express cars, thereby putting the plaintiff's express matter twelve hours or more behind the defendant's express matter and that forwarded by it for other persons, thereby driving plaintiff's customers away from it, destroying the good will and favor of the public for plaintiff, and in

so far destroying plaintiff's business, to the great wrong and injury of plaintiff.

(7.) That during the whole period from the granting of said injunction and notice thereof to defendant down to the 25th of March, 1882, defendant unjustly discriminated against the plaintiff in this: that it charged plaintiff, and compelled it to pay, as a precedent condition to transportation of its express matter, a greater amount on shipments for a less distance than it exacted and collected for the transportation of the same class and quantity of goods from plaintiff and others for a greater distance, and compelled the plaintiff to pay the said unreasonable and illegal charges, to its great wrong and injury.

(8.) That during the whole period last mentioned the said defendant unjustly discriminated against the plaintiff in this: that it charged plaintiff, and compelled it to pay, a greater amount as compensation for transportation of plaintiff's express matter over portions of its road, than it charged and compelled plaintiff and others to pay for transportation of similar quantities of the same class of express matter over other portions of its road of equal distance, to the great wrong and injury of plaintiff.

(9.) That said defendant, in all and each of the wrongs and injuries above mentioned, disobeyed and violated the injunctions of the Court in that behalf, in contempt of the authority of the Court and to the great wrong and injury of the plaintiff.

(10.) And in conformity to the terms of said decree, your petitioner respectfully prays that it be referred to a master in chancery to be appointed *pro hac vice* in this particular case, to investigate, examine and report to the Court as provided in said decree and by the rules of the Court, what is now and has been since the filing of the said plaintiff's bill, a reasonable rate of compensation to be paid to said defendant by plaintiff for transporting plaintiff's express matter, and messengers in custody and charge thereof, on the railway trains and cars of defendant, and affording to plaintiff all necessary and reasonable facilities and accommodations for conductng its business in that behalf; the same to be found and established as a unit, including transportation and accommodation for both the express freights and messengers of plaintiff, as aforesaid.

Also to investigate, examine and report, as aforesaid, as to the allegations of wrong and injury aforesaid, and for the purposes aforesaid to use all evidence taken heretofore in said cause and on file therein, both oral and written, and to re-examine the same witnesses, if necessary, and any other witnesses to be produced by the parties, and to conduct the proceedings before him at such times and places as he may designate; and to state an account of the express business conducted by plaintiff over defendant's lines from the filing of plaintiff's said bill to the 25th day of March, 1882; and what amount the plaintiff has

paid to the defendant on account of transportation of its express matter and messengers, and accommodations extended to it by defendant during the time last-named, and what amount, if any, has been paid to defendant in that behalf in excess of a reasonable and legal compensation therefor; and what damages the plaintiff has sustained by the wrongs and injuries as aforesaid alleged, and to report to the Court all the evidence received by the said Master, and all his actings and doings, and, as in duty bound, your petitioner will ever pray.

F. E. WHITFIELD,
GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
Solicitors for Plaintiff.

C. A. SEWARD,
Of Counsel.

In the Circuit Court of the United States, for the Eastern District of Missouri, In Equity, Southern Express Company, plaintiff, *v.* St. Louis, Iron Mountain and Southern Railway Company, respondent, United States of America, Eastern District of Missouri, sict.:

And now at this day comes Calvin H. Albright, who on his oath states that he was agent of the Southern Express Company for several years immediately preceding January 15, 1882, and since that time to the present time he has been route agent of said Southern Express Company and now is such route agent; that he has read the annexed petition of said Southern Express Company and on his own knowledge the statements in said petition are true in almost the whole scope and extent thereof, and that all said statements are true on information and belief of this affiant, and further saith not.

C. H. ALBRIGHT.

Subscribed and sworn to before me, this 15th day of May, 1882,

[L. S.] VIRGIL M. HARRIS,
Notary Public.

UNITED STATES OF AMERICA, *Eastern District of Missouri*, } ss.:

I, M. M. PRICE, Clerk of the Circuit Court of the United States, in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy of petition for appointment of Master *pro hac vice* in case No. 1,667, of Southern Express Company, plaintiff, against St. Louis, Iron Mountain and Southern Railway Company,

defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix
[L. S.] the seal of said Court, at office in the City of St. Louis, in said district, this 12th day of October, in the year of our Lord eighteen hundred and eighty-two.

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

XVIII.—At the same March Term of 1882, to wit, on the 5th day of June, 1882, the Circuit Court modified the said decree of the 25th of March, 1882, as appears by a certified copy of such modification herewith filed, and which copy is in the words and figures following:

"UNITED STATES OF AMERICA, } ss.:
Eastern District of Missouri, }

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE EASTERN DISTRICT OF MISSOURI.

Be it remembered that on the 5th day of June, A. D. 1882, at a regular Stated Term of said Court, the following, among other proceedings, were had and appear of record, to wit:

SOUTHERN EXPRESS COMPANY,
Plaintiffs,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Defendants.

Now, at this day come the parties, and the petition of the plaintiff filed herein June 3d, 1882, having been fully considered by the Court, it is ordered that there be referred to George H. Shields, Esq., as

Master *pro hac vice*, to investigate, examine and report to the Court under said decree of March 25th, 1882, pursuant to the rules of the Court in such cases provided.

First.—What was, during the period between the injunction order herein of June 1st, 1880, and the 25th day of March, 1882, the rate actually enforced by the defendant against plaintiff for carrying its express freight over such portion of its line as the said plaintiff was allowed to send its express freight over, and what price in addition thereto, if any, it charged for the fares of messengers in charge of said freight, and state an account showing said rates and fares, between said dates, and the amount thereof, respectively.

Second.—What were the statutory rates for carriage of ordinary freights by said defendant during said period, and state an account of the same, as applied to the express freight transported by defendant for said plaintiff during said period, as if the same were ordinary freights.

Third.—What was, during the same period, a reasonable compensation to be paid by plaintiff to the defendant for allowing plaintiff all reasonable and proper facilities for conducting plaintiff's business over defendant's road, cars and lines; the same to be found as a unit, including compensation for the transportation both of plaintiff's express matter and messengers in the custody and control thereof; also what amount during the same period the plaintiff was required to pay, and has paid to the defendant in that behalf; and if the amount so paid by plaintiff has exceeded such reasonable compensation to state an account thereof.

Fourth.—Whether, during said period, defendant included in its charges for transportation of express matter for plaintiff, charges also for accessorial service not performed by said defendant but performed by plaintiff for itself. Under the term 'accessorial' service, as herein used, the Master will include only the costs and expenses of collecting and delivering express matter to the respective railroad depots or stations for transportation by defendant on its road and cars, and of delivering such express matter on the arrival of the same at the place of destination to the consignees thereof at any other place than at its depots or stations, respectively.

Fifth.—Whether, during the period aforesaid, the defendant required plaintiff to pay, and plaintiff paid, for transportation of its messengers in custody of its express matter other than usual passenger fares; and whether, during the same period, defendant has discriminated against plaintiff by transporting express messengers other than plaintiff's at less rates than it compelled plaintiff to pay, and if so, to state an account of the excess paid by plaintiff over either of said rates.

Sixth.—And whether, during the same period, defendant discriminated against plaintiff by charging and compelling plaintiff to pay for

transportation of its express matter higher rates and greater amounts than it charged others for the same and similar services; and if so, to state an account of the amount of money by means of such discrimination so paid or required to be paid by plaintiff above the rates so allowed to others than plaintiff for such service.

Seventh.—Whether, during the period aforesaid, the defendant discriminated against plaintiff by refusing to allow plaintiff to conduct its business on any of defendant's lines, trains and express cars in use during said period, on which defendants and others conducted express business while plaintiff was so excluded, and whether by such exclusion of plaintiff and its business its express matter and messengers were hindered and delayed, and plaintiff was thereby prevented from competing with defendant and others conducting express business over said lines; and if so, what damages, if any, were sustained by plaintiff in its business, and state an account thereof.

Eighth.—It is further ordered that, for the purposes of the reference hereby directed, the master is to use all evidence on file in this cause, and any other produced by the parties, and re-examine the same witnesses, if necessary, and any other witnesses produced by the parties, and conduct the proceedings before him at such times and places as he may designate, on due notice to the respective parties, and report his findings and all the evidence taken before him."

"UNITED STATES OF AMERICA, }
Eastern District of Missouri, } ss.:

I, M. M. PRICE, Clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy, order of reference to master *pro hac vice* in case No. 1667, of Southern Express Company, plaintiff, against the St. Louis, Iron Mountain and Southern Railway Company, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court at office, in the City of St.
[L. S.] Louis, in said district, this 12th day of October in the year of our Lord eighteen hundred and eighty.

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy."

XIX.—Thereafter and on the said 5th day of June, 1882, the said March Term of the said Court was, as appears by the certificate of the Clerk herewith filed, finally adjourned by an

entry on the record of said Court, as stated in said certificate, as follows:

"And afterwards, to wit, on the 5th day of June, 1882, the following appears of record in said Court, to wit:

Ordered, that Court be and it is now adjourned without day.

(Signed) SAMUEL TREAT.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } ss.:

I, M. M. PRICE, Clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy of entries opening and closing the March Term, 1882, of said Court as fully as the same remain of record in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court at office, in the City of St. Louis, in said district, this 20th day of October in the year of our Lord eighteen hundred and eighty-two.

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy."

Wherefore, your petitioner prays and respectfully moves the Court now here to dismiss the said appeal from the said decree of March 25, 1882, upon the following grounds:

1. This Court has no jurisdiction of such appeal.

2. The said decree was and is not final.

3. The said decree was and is interlocutory or provisional only.

4. The said decree does not decide all the issues between the parties, or those raised by the pleadings, and as to which the larger portion of the evidence aforesaid was addressed.

5. The said decree, on its face, leaves such issues pending and undetermined in the Circuit Court, which is proceeding to determine the same.

6. The appeal was taken before the end of the term at which such decree was pronounced.

7. Such decree was modified by the Circuit Court at the same term at which it was pronounced by a further interlocutory or provisional decree, under which proceedings are still pending in said Circuit Court.

8. The said decree was and is premature.

Your petitioner has caused copies of the foregoing motion, and of the notice of motion hereinunder given, and of your petitioner's brief in support thereof, which is hereto annexed, to be duly served according to the rules of this Court, upon the counsel in this Court for the appellant herein, and hereto annexes proof of such service.

And your petitioner prays for such other or further or different relief as to the Court may seem meet.

THE SOUTHERN EXPRESS COMPANY,
By HENRY B. PLANT,
President.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Counsel for Petitioner.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss. :

HENRY B. PLANT, being duly sworn, deposes and says: That he is the President of the Southern Express Company; that he has heard the foregoing petition read, and that the matters and things therein contained are true to his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

Sworn to before me, this }
day of November, 1882. }

JOSEPH GUTMAN, JR.,
[L. S.] *United States Commissioner,*
Southern District of New York.

UNITED STATES SUPREME COURT.

THE SOUTHERN EXPRESS COMPANY, *Appellee,* *vs.* THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, *Appellant.*	No. 914.

J. O. BROADHEAD, Esq., *of Counsel for Appellant.*

ST. LOUIS, Missouri.

SIR: You will please take notice, that on Monday, the day of December, 1882, a motion, of which a copy is hereto annexed, together with a petition, of which a copy is also hereto annexed, and a brief in support of said motion and of the prayer of said petition, of which brief a copy is also hereto annexed, will be presented to this Court at the opening of its session on that day, or as soon thereafter as counsel can be heard, and the said Court will then and there be asked on behalf of the appellee and upon the grounds in said motion and petition stated, and for the reasons in said brief assigned, to grant the said motion and the prayer of the said petition and to dismiss the appeal herein, and also to then and there accord to the appellee such other or further or different relief as to said Court may seem meet.

Dated November , 1882.

Yours respectfully,

GLOVER & SHEPLEY,
S. M. BRECKENRIDGE,
F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Appellee.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } ss.:

, being duly sworn, deposes and says, that on the day of November, 1882, he personally

served upon J. O. Broadhead, Esq., at the City of St. Louis, a copy of the foregoing motion and petition, as the same are hereinbefore printed, and also a copy of the brief hereto annexed, by delivering all such copies to and leaving the same with him personally.

Sworn to before me this
day of November, 1882.

U. S. Commissioner.

SUPREME COURT OF THE UNITED STATES.

THE SOUTHERN EXPRESS COMPANY, *Appellee,* *vs.* THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, *Appellant.*	*No.* 914.

BRIEF FOR APPELLEE IN SUPPORT OF THE FOREGOING MOTION AND PETITION.

I.

An appeal is a matter of statutory right, and in Equity lies from final decrees only.

R. S., Sec. 692: "An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court * * * in cases of equity * * * jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum of value of five (18 *Stats. at Large,* 315) thousand dollars, and the Supreme Court is required to receive, hear and determine such appeal,"

This statutory appellate jurisdiction is all that has been conferred by Congress, and in its exercise the Court can proceed only in the manner which the law prescribes. (*Barry*

v. *Mercein*, 5 *How.*, 119; *Durasseau* v. *U. S.*, 6 *Cranch*, 314; *U. S.* v. *Curry*, 6 *How.*, 113; *Ex parte Vallandigham*, 1 *Wall.*, 251; *U. S.* v. *Young*, 94 U. S., 259.)

II.

Although the transcript was filed at this term only the appellee may now move to dismiss the appeal, and before the cause is reached in its regular order, if the decree appealed from was not a final one. This may be done in analogy to the practice of the Court, under which it entertains a motion to dismiss a writ of error before the return day thereof (*Clark* v. *Hancock*, 94 *U. S.*, 493).

Or, under the authority in relation to appeals in *Ex parte Russell* (13 *Wall.*, 671), in which the Court said:

"The case is virtually in the possession and subject to the control of this Court, as soon as the appeal is effectively taken, and we see no reason why the appellee should not at any time, when the Court is in session, apply to have the appeal dismissed, provided the question can be properly presented to the Court. Of course the Court would not hear the motion without having the record before it; but that could be procured and presented by the appellee, as is done where the appellant has failed to have the record filed in due time. Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which in regular course the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice."

III.

The Court will entertain a motion to dismiss an appeal before the record is printed, if the motion papers fully present the facts, and the Court is not required to inspect the transcript for the purpose of determining whether such facts

do or do not exist. *In National Bank* v. *Insurance Co.* (100 *U. S.*, 43), the Court said:

"The record has not been printed, and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

This seems to clearly concede that if the motion papers do present the case and the facts upon which the motion is based, in such a manner as to enable the Court to act understandingly, the Court will entertain jurisdiction of a motion to dismiss before the record is printed.

There can be no dispute as to the facts upon which this motion is based. They all exist in the records of the Court below, and such records are all contained in the transcript, or in the certified copies which constitute the motion papers, and are all printed among such papers, so that there can be no disagreement as to what has transpired in the Circuit Court.

IV.

The fact that an appeal has been allowed by the Court below is of no weight in deciding the question whether such appeal was properly allowed. In *Callan* v. *May* (2 *Black*, 541), the Court said:

"It seemed to be supposed by counsel in the argument, that the order of the Judge of this Court, allowing the appeal, was conclusive and that its validity was not now open to dispute. But the allocatur of a Judge was never so considered. * * * A contrary doctrine would be exceedingly inconvenient, if it could be maintained, and would throw upon a single Judge the responsibility which properly belongs to the Court, and it does not, by any means, follow that the Judge who authorizes the appeal, has made up his own mind that the party is legally entitled to it. He may, and no doubt often does entertain doubt upon the subject, and in such cases he grants the appeal to bring the matter before the Court and enable it to decide for itself whether the case is or is not within their appellate jurisdiction, as regulated by the Act of Congress. The allocatur of a single Judge

certainly cannot enlarge the appellate powers of this Court beyond the limits prescribed by law."

V.

The facts upon which the motion is based are record facts. Part of these are contained in the transcript from which they have been extracted, and a part are contained in the certificates of the Clerk of the Circuit Court, which have been submitted. The enquiry now arises, can these certified copies from the record of the Circuit Court, which were made therein after the decree appealed from was pronounced, be regarded by this Court in determining the present motion?

In *Hodgkins* v. *Kemp.* (18 *How.*, 534), the Court said:

"Certificates or statements of the Clerk outside of the record, and given since it was certified and transmitted to this Court, have been filed as evidence of the irregularity of the removal. This evidence is not admissible upon the present motion. * * * * The motion is made to dismiss the case, not for any irregularity apparent in the record, but by testimony *aliunde*, offered to show that the transcript is incorrect. It is very clear that such testimony cannot be received to support this motion, and the record as it stands when the motion is made, presents the case which this Court is called upon to decide, and nothing outside of it can be introduced to affect the decision."

If, therefore, the certificates now submitted, were offered to impeach or impair the integrity of the transcript, it is clear that under this decision the Court could not regard them in disposing of the present motion. It is equally clear, however, that such certificates are not offered to impeach or impair the transcript, but simply to supplement it, so as to show to this Court that the decree appealed from was not considered by the Court below as final; that that Court claimed and exercised at the same term, subsequent jurisdiction over the decree, and lawfully modified it; and by so doing converted it, even if it had been a final decree, into an interlocutory one, which interlocutory decree became part of the original decree, and the whole is now in process of execution in the Court below.

This Court has always claimed the right and exercised the power of receiving evidence *aliunde*, and *dehors* the record

for the purpose of sustaining its jurisdiction, or of showing that, by reason of a fact occurring subsequently to the taking of a regular and proper appeal, it had lost jurisdiction of the same.

Thus in *Ex parte Bradstreet* (7 *Peters*, 634), the Court said:

"In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated, * * * the practice of this Court is to allow the value to be given in evidence. In pursuance of this practice, the demandant would have a right to give it in evidence in this Court."

In *Rush* v. *Parker* (5 *Cranch*, 287), the counsel asked time to show by affidavit the real value of the matter in dispute, and the time was granted.

In *Richmond* v. *Richmond* (21 *How.*, 391), the Court said:

"In such cases affidavits of value have been received here in order to show that the value is large enough to give jurisdiction to this Court."

In the *Grace Girdler* (6 *Wall.*, 441), which was an appeal in admiralty, the Court said:

"It is the practice of this Court, when it is claimed that the value in controversy gives jurisdiction, to allow an opportunity to make proof of the fact. An order will be made, therefore, allowing the appellants to make proof of jurisdictional value by affidavits, and to file such proof with the Clerk of the Court within twenty days."

So also in aid of its jurisdiction, and to defeat a motion to dismiss a writ of error for want of citation, the Court, in *Cook* v. *Moffatt* (5 *How.*, 295), said:

"The presumption is, that one was issued when the writ of error was allowed, and it may be proved *aliunde*."

So to sustain its jurisdiction and to defeat a motion to dismiss an appeal, upon the ground that no appeal bond was given, the Court, in *Anson* v. *Blue Ridge Co.* (23 *How.*, 1), gave the appellant sixty days to give the bond and file it with the Clerk.

So, on the contrary, is it the practice of the Court to receive evidence *aliunde* to show that its jurisdiction has been lost. This clearly appears from the decision in *Lord* v. *Veazie* (8 *How.*, 251), the head-note of which states the decision of the Court, as follows:

"Where it appears to this Court, from affidavits and other evidence filed by persons not parties to the suit, that there is no real dispute between the plaintiff and the defendant, but, on the contrary, that

their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered *pro forma*, is a nullity and void, and no writ of error will lie upon it, and it must therefore be dismissed."

In the case of *Cleveland* v. *Chamberlain* (1 *Black*, 419), a motion was made on affidavits filed in this Court to dismiss the appeal upon the ground that the appellant was the only party on record who had any interest in the cause either way —that he was conducting the appeal on both sides—and that strangers to the record would suffer from such decree as the appellant might procure. The Court said:

"This appeal must be dismissed * * * About a month after the decree was entered, the appellant became the equitable owner of the judgment, and the *dominus litis* on both sides. * * * This case came on to be argued on the transcript of the record, and it appearing to the Court here from affidavits and other evidence filed that this appeal is not conducted by parties having adverse interests, * * * it is ordered and adjudged that the appeal be and the same is hereby dismissed."

In *Wood Paper Company* v. *Heft* (8 Wall., 333), the bill was dismissed by the Court below. An appeal was taken to this Court. Pending the appeal, one Meech asked leave to intervene by counsel upon an allegation that, since the decree below, the case had been settled. Meech was allowed to intervene, and a commission was issued to take proofs in the matter, and these being before the Court, the motion to dismiss came on to be heard, and upon such proof, the motion to dismiss was granted.

In *United States* v. *Peggy* (1 *Cranch*, 103), the Court took judicial cognizance of a law passed after the judgment was rendered, and upon that fact set aside the judgment. It was argued that, if the judgment was correct, it could not be made otherwise by anything subsequent to its rendition. The head note states the substance of the decision of the Court, as follows:

"The Court is as much bound as the executive to take notice of a treaty, and will reverse the original decree of condemnation, although it was correct when made, and decree a restoration of the property under the treaty made since the original condemnation."

So also will the Court dismiss an appeal (*Portland* v. *United States*, 15 *Wall.*, 1) upon evidence *aliunde*, because the appellant had not filed a brief, and it will likewise dismiss an ap-

peal (*Selma* v. *Bank*, 4 *Otto*, 253), because the transcript was filed and the cause docketed without a bond to the clerk.

In *United States* v. *Ayres* (9 *Wall.*, 608), an appeal had been taken from a judgment of the Court of Claims. While the appeal was pending in this Court, a motion for a new trial was made in the Court of Claims, and a motion was made upon that ground to dismiss the appeal. The motion was denied. The Court of Claims granted the new trial, and the motion to dismiss the appeal was renewed upon that fact alone. The Court said:

"The petitioners obtained a judgment in the Court below against the Government, from which an appeal has been taken, and is pending in this Court. A new trial has since been granted by the Court below, and the payment of the judgment stayed. * * * It is quite clear that the order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause. This is the legal effect of a new trial by a Court competent to grant it. There is no reason, therefore, for continuing any longer the case on the docket. The motion to dismiss is granted."

In the *United States* v. *Crussell* (12 *Wall.*, 175), the United States moved to continue an appeal from the Court of Claims, founded upon the fact that evidence had been newly discovered on which a motion on behalf of the United States had been made for a new trial. The Court said:

"In the case of the *United States* vs. *Ayres* the Court denied a motion to dismiss an appeal from a judgment of the Court of Claims, when the motion was made upon the sole ground that a motion for a new trial had been made by the United States, and was pending in that Court, but afterwards dismissed the same appeal when a new trial had been granted. We are satisfied with the rulings then announced, and think that the spirit of it requires us to allow the continuance now asked for."

In *United States* v. *Young* (94 *U. S.*, 258), the same motion to dismiss was made, founded upon the same suggestion, to this Court that the Court of Claims had granted a new trial after the appeal had been taken and the record brought to this Court. The appeal was dismissed, the Court citing *U. S.* v. *Crussell* (12 *Wall.*, 175); *Ex parte Russell* (13 *id.*, 664), and *Ex parte United States* (16 *id.*, 699).

It is apparent from these decisions that there are cases in which the Court permits facts transpiring subsequently to

the appeal to be brought before it by evidence *aliunde*, and *dehors* the record, and that, when so brought, the Court will consider it and make such disposition of the appeal thereon as the justice of the case may require.

The contention of the appellee is two-fold :

First.—That the decree appealed from is, upon its face, not a final, but an interlocutory decree only.

Second.—That, if it was final, it was converted by the subsequent action of the Court below, at the same term, into an interlocutory decree. Whether such conversion did or did not take place is a question which can only arise, as in the cases cited of the appeals from the Court of Claims, by bringing to the attention of the Court evidence of what was done by the Court below, after the decree appealed from was pronounced. Though the appellee may be in error in its construction of what subsequently occurred in the Court below, that error cannot lead to the result that the evidence offered of such act must be rejected as *aliunde*, or as tending to impeach or impair the integrity of the transcript. If the appellee is right in its interpretation of the subsequent record facts, then the evidence of such facts is properly to be admitted to show that the jurisdictional element of finality in the decree appealed from has ceased to exist, and therefore that the appeal should be dismissed.

VI.

The decree below was not final.

1. It is elementary law that a decree relates back to the filing of the bill, and that it ought, if it be a final decree, to dispose, (1), of the issues raised by the pleadings ; (2), of those created by the acts of the parties *pendente lite.*

2. There were two issues of law raised by the pleadings as originally framed : (1), Was it the public duty of the appellant to afford transportation and other needful facilities to the appellee, for the transportation of its express matter and messengers and the conduct of its business, whereby the private right of the appellee might be subserved ? (2), If so,

what was "a fair and reasonable rate of compensation" (*Union Co.* v. *United States*, 104 *U. S.*, 667), to be paid by the appellee for such services by the appellant.

The first was a question of law *simpliciter*, depending upon those principles which were sustained by this Court in *Barton* v. *Barbour* (104 *U. S.*, 135).

The other was a question of law (*Union Co.* v. *United States*, *supra*), to "be determined upon a consideration of all facts material to the issue."

The prayers of the bill were directed specifically to the solution of this latter question, and sought a decision thereon as to what was "a fair and reasonable rate of compensation" to be paid by the appellee, if the public duty existed, from the date of the commencement of its suit.

The averments of the bill stated what, in the judgment of the appellee, was "a fair and reasonable rate of compensation," viz. :—a rate not in excess of classified railway freight rates as provided by law, not in excess of the rates prescribed by the Railroad Commissioners of the State, and not to include any compensation for the accessorial services rendered by the appellee off and beyond the railway lines of the appellant.

The answer of the defendant took issue upon the question of the fairness and reasonableness of the rates suggested in the bill, and denied any obligation on the part of the appellant to render the claimed services for either the statutory rates or those prescribed by the commissioners, or to make any deduction by reason of the accessorial service.

The bill further specifically prayed—looking forward to the pendency of the suit—that, if any dispute should arise pending the litigation as to what was a fair and reasonable compensation, the Court would adjudge that also.

By far the larger portion of the evidence in the voluminous transcript is addressed to the proper answer to be given to these prayers, and to the issues so joined. That such dispute did arise *pendente lite* is conclusively established by the decree appealed from, which states in its tenth paragraph the grounds thereof. That such evidence was so taken is conclusively established by the last paragraph of the modified decree of June 5, 1882, which, after referring the very issues raised by the pleadings and the acts of the parties, and hereinbefore stated, to a Master, authorizes the Master to use in his examination of the case "all evidence filed in this cause."

It is evident from the decree not only that it does not decide, but also that it was not intended to decide the second question of law between the parties, namely, what was a fair and reasonable rate of compensation to be paid by the appellee since the commencement of the suit? The decree on its face is prospective only, and purposely leaves the rate of compensation between June 21, 1880, and March 25, 1882, and down to this very day undecided. It provides an arbitrary rate for the future only, and as to that gives leave for a further day in Court. On such further day whatever rate, both for the past and the present, the Court below may adopt upon the coming in of the Master's report, will then be properly to be submitted to the Court below as the proper rate to be substituted by the Court for the future, instead of the rate now arbitrarily fixed.

The decree appealed from was founded upon the opinion of Mr. Justice MILLER. It is evident from that opinion that he did not intend to fix a final rate which should control the past, the present and the future, but only an arbitrary rate to be complied with until after due "consideration of all facts material to the issue," the Court should be prepared to prescribe what, "as a question of law," was the proper "rate of computation."

The opinion says:

"To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice. To avoid this difficulty, I think that the Court can assume that the rates or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the Court at stated intervals, and claim an addition to, or rebate from, the amount so paid. When no such arrangement has heretofore been in existence, it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of *final revision on evidence, reference to Master, etc.*"

Inasmuch as the contracts between the railroad and the express company had been terminated, and as the railroad company had commenced to conduct an express business for itself, and which it has, since June 1, 1880, so conducted in competition with and in diminution of the business of the appellee, and as

the record in the Court below did not show that the parties had agreed as to the rates to be paid by the appellee, it is quite evident that the case presented fell within the contingency suggested by the opinion of the Court, "when no such arrangement has heretofore been in existence, it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to a Master, etc."

The Court had decided the first question of law involved in favor of the appellee. As there had been no arrangement between the parties heretofore in existence as to the rate of compensation, it became necessary to suggest some method by which the benefit of the decision could be secured to the appellee. The opinion suggests how this could be done as an *ad interim* proceeding.

If the appellant had been content to permit the Court below to carry into effect, by its interlocutory decree, the suggestion of the opinion, there would have been no necessity for this motion. But it insisted upon having a decree upon the first question of law only, leaving the suggestion in the opinion, as to the methods to be pursued for obtaining the facts material to be considered in deciding the second question entirely unacted upon, and therefore leaving the case also but partially decided. It then hastened with its fragmentary appeal to this Court, upon the assumption that it would regard the decision of half the case as equivalent for the purposes of an appeal, to a final decision of the whole case. This the appellee claims to have been an error.

The decree appealed from does not purport to find, as a question of law or of fact, what is a fair and reasonable rate for the appellee to pay. All that it really decides upon this question is that a perpetual injunction issue restraining the appellant "from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever, the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight" * * * reserving to either party a right * * * hereafter to apply."

This was not the finding, as a matter of law, that fifty per cent. in advance of ordinary freight rates was a fair and reasonable compensation to be paid from the commencement of

the suit, but was simply the temporary carrying into effect the suggestion contained in the opinion that "it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to a Master," etc.

Very much the same procedure took place in the case of *The Yuba* (4 *Blatch.*, 314). That was a libel to recover the amount of $9,240 due on a bottomry bond. The District Court gave a decree for $4,000, with interest and costs, with liberty to either party, within twenty days, to take an order of reference to a Commissioner, to ascertain and report the amount of the sums composing the bottomry, and what portions thereof had been previously a lien upon the vessel, with liberty to apply, &c. The libellant appealed to the Circuit, under the statute which authorized an appeal from a final decree.

NELSON, *J.*, said:

"It is manifest, from the form of the decree in this case, that it was not intended to be final. A gross sum is stated provisionally, subject to be modified by the Court on the coming in of the report of the Commissioner. * * * The $4,000 fixed seems to have been a formal sum, with a view to the reference and the ascertaining of specific data from which the proper amount might be inserted in the final decree. * * * The appeal must be dismissed."

That the rate inserted in the decree was intended to be arbitrary and provisional only, is further shown by the tenth paragraph of the decree, which was founded upon the second and third prayers of the bill, and in aid of the issues raised by the pleadings, and which was in the words following:

"X.—Whereas, it is alleged by complainant that since the commencement of this suit"—that is since the termination of the contract establishing the rate of compensation—"and the service of the preliminary order of injunction herein the defendant has, in violation of said injunction *and of the right of complainant*, made unjust discriminations against complainant, *and has charged complainant unjust and unreasonable rates for carrying express matter*, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon."

This was precisely the suggestion contained in the opinion, and the whole scheme therein prescribed ought, and but for the resistance of the appellant, would have been carried out

in the decree appealed from. If it had been so carried out this motion would have been without foundation. That the rate inserted in the decree appealed from was arbitrary and provisional only, and that the question what was a fair and reasonable rate of compensation was left wholly undetermined, is conclusively established by the first and third paragraphs of the modified decree of the 5th of June, 1882, which were as follows:

"*First.*—What was during the period between * * June 1, 1880"—the day when the defendant commenced to do its own express business—"and the 25th day of March, 1882, the rate actually enforced by the defendant against the plaintiff for carrying its express freight. * * * *Third.* What was during the same period a reasonable compensation to be paid by plaintiff to the defendant for allowing plaintiff all reasonable and proper facilities for conducting plaintiff's business over defendant's road, cars, and lines; the same to be found as a unit, including compensation for the transportation both of plaintiff's express matter and messengers in the custody and control thereof; also what amount during the same period the plaintiff was required to pay and has paid to the defendant in that behalf, and if the amount so paid by plaintiff has exceeded such reasonable compensation, to state an account thereof."

This was precisely in furtherance of the opinion, and in aid of a solution of the question of law still undecided—what is a fair and reasonable rate of compensation? The appellee claims that it has paid large sums in excess of a fair and reasonable compensation. If it has done so, the fund is held by the appellant in trust, and no decree can be considered as final which does not find the amount so held, and award restitution, and terminate the trust.

The fourth clause of the decree of June 5, 1882, requires the Master to ascertain what amount paid by the appellee has been for the accessorial service rendered by it. This was in aid of the issue, as to such service, raised by the pleadings.

It is quite evident that the rate of compensation is a vital question in the case and without a decision thereon the appellee cannot have the just benefit of the decree appealed from, which provides in its ninth paragraph.

"That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff as herein specified for a just and reasonable compensation."

The appellee cannot have the full benefit of this decision

until the rate of compensation for the enjoyment of the facilities decreed is established. Therefore it is clear that the further action of the Court below is needed to enable the appellee to have the benefit of that which was decreed in the decree appealed from.

The question of what is a final judgment or a final decree has been frequently before the Court. It has decided that there can be no difficulty in determining when a judgment is final by applying to it the test of the right to issue execution thereon. If execution can be issued then the judgment is final.

In analogy to this it has also held that a decree of sale in a foreclosure suit was final for the purposes of an appeal, the reference to a Master to compute being considered as a step in aid of the execution only of the decree (*Ray* v. *Law*, 3 *Cranch*, 179; *Whiting* v. *Bank*, 13 *Peters*, 15; *Carr* v. *Hoxie*, *id.*, 460; *Bronson* v. *Railroad Co.*, 2 *Black*, 524; *Railroad Company* v. *Swasey*, 23 *Wall.*, 409.

In other cases, however, the Court has admitted that the question of what is a final decree in equity was a *questio vexata*, and not to be resolved without difficulty.

It would be profitless to examine in detail the long catena of authorities upon the question of what is and what is not a final judgment or decree, to be found in the cases of—

Young v. *Grundy*, 6 *Cranch*, 51.
Houston v. *Moore*, 3 *Wheat.*, 433.
Gibbons v. *Ogden*, 6 *id.*, 448.
The Palmyra, 10 *id.*, 502.
The Santa Maria, 10 *id.*, 444.
Chace v. *Vasquez*, 11 *id.*, 429.
Canter v. *Am. Co.*, 3 *Peters*, 318.
Brown v. *Swan*, 9 *id.*, 1.
Young v. *Smith*, 15 *id.*, 287.
Forgay v. *Conrad*, 6 *How.*, 201.
Perkins v. *Fourniquet*, 6 *id.*, 206.
Puliam v. *Christian*, 6 *id.*, 409.
Barnard v. *Gibson*, 7 *id.*, 650.
U. S. v. *Girault*, 11 *id.*, 32.
Fourniquet v. *Perkins*, 16 *id.*, 82.
Craighead v. *Wilson*, 18 *id.*, 200.
Beebe v. *Russell*, 19 *id.*, 283.
Farrelly v. *Woodfolk*, 19 *id.*, 288.

Humiston v. *Stamthorp*, 2 *Wall.*, 106.
Thompson v. *Bean*, 7 *id.*, 342.
Railway Co. v. *Swasey*, 23 *id.*, 409.

but a reference may be made to the language of the Court in a few of the cited cases.

In *The Palmyra* (*supra*), a decree of the Circuit Court awarded a restitution and for costs and damages, and the cause was brought by appeal to this Court. It was suggested by the Attorney-General for the appellants that, after the decree of restitution and for damages, there had been a reference to commissioners to ascertain the amount of damages, and, before the report of the commissioners had been acted upon by that Court the appeal was taken. The Court said:

"The decree of the Circuit Court was not final in the sense of the Act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole case is not, therefore, finally determined in the Circuit Court.

This case came up again (12 *Wheat.*, 1), where the Court said:

"It not appearing that there had been any final decree in the Circuit Court ascertaining the amount of damages the cause was dismissed. But at the last term, it being discovered that, in point of fact, there had been a final award of damages which was omitted by mistake in the transcript of the record, certified by the Clerk of the Court below, this Court, on motion of the appellant, orders the cause to be reinstated."

And it did this apparently without any *certiorari*, and on evidence of the fact *aliunde*, and it then affirmed the decree.

In *Chace* v. *Vasquez* (*supra*), which was a libel *in personam* for damages, a decree was taken for the libellants in the Circuit Court, and commissioners were ordered to be appointed to assess the damages. But the appeal was taken before the commissioners were appointed, upon the ground that no libel could be sustained *in personam* in such cases. It was argued that the sole inquiry was whether any libel *in personam* could be sustained, an objection that covered the whole libel and the entire decree, and that, if no libel could be sustained, an expensive and tedious investigation would be saved by first establishing the point that a libel *in personam* could not be sustained in such cases. The Court were of opinion that the

case was embraced by the principle decided in the case of *The Palmyra*, since an appeal would still lie from the damages, when ascertained, and the appeal was dismissed.

In *Brown* v. *Swain* (*supra*), a bill was filed in the Circuit Court to enjoin the collection of a judgment at law upon the ground of usury. There was a demurrer to the bill which was overruled, and an injunction was ordered perpetually restraining the defendant from collecting on the judgment more than $890.70, and reserving an inquiry as to whether the sum of $50 was due. The defendant prayed an appeal to this Court, which was granted. Under the decree and appeal the parties went on to take depositions with reference to the $50, and the Court again made the injunction perpetual beyond the said sum of $890.70. A motion was made to dismiss the appeal, on the ground that the decree appealed from was not final within the meaning of the law, and the facts transpiring subsequently to the taking of the appeal were brought before the Court, and are stated in the report. The appeal was dismissed, as having been granted before there was a final decree in the case.

In *Young* v. *Smith* (*supra*), a bill was filed by a residuary legatee to recover from the executors. A reference was had to a Master, who made his report that a certain sum was in the hands of the executors, exclusive of sundry uncollected debts then outstanding, some of which were good and some bad. The Court decreed that the report should be accepted, and that the complainants should have execution for the sum reported in the hands of the executors, and that the residue of the debts, when collected, should be paid into Court for distribution, under the direction of the Court. It was held that this was an interlocutory and not a final decree in the sense of the Act of Congress, and that an appeal from the same could not be taken. The Court said:

"We are of opinion that the decree is an interlocutory and not a final decree."

In *Forgay* v. *Conrad* (*supra*), the Court said:

"The decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution, and, according to the last paragraph of the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master" (such accounts being of sundry sums of money which the complainant alleged had been received by one or more of the

defendants which belonged to the bankrupt estate at the time of its bankruptcy). "In all other respects the whole of the matters brought into controversy by the bill are finally disposed of as to all the defendants, and the bill as to them is no longer pending before the Court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing within the time prescribed by the rules of this Court regulating proceedings in equity in the Circuit Court. * * * In limiting the right of appeal from final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same Court, and to have the whole case and every matter in controversy in it decided in a single appeal. * * * The decree upon these matters might and ought to have awaited the Master's report, and when the accounts were before the Court, then every matter in dispute might have been adjudicated in one final decree, and if either party thought himself aggrieved, the whole matter would be brought up and decided in one appeal, and the object and policy of the Acts of Congress upon this subject carried into effect. These remarks are made in order to call attention to an inconvenient practice, and which is regarded by this Court as altogether inconsistent with the object and policy of the Act of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated by successive appeals to produce great and unreasonable delays in suits in Chancery."

In *Perkins* v. *Fourniquet* (*supra*), the Circuit Court decreed that the complainants were entitled to two-sevenths of certain property, and referred the matter to a Master in Chancery to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the Master's report. It was held that this was not such a final decree as could be appealed from to this Court. The Court said:

"This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree, passed by Courts of Chancery in cases of this kind, and it is absolutely necessary to prepare the case for a final hearing and final decree when the complainant is entitled to a partition of property or an account. For the principles upon which an account is to be stated by the Master, or a partition made, cannot be prescribed by the Court, until it first determines the rights of the parties by an interlocutory order or decree, and the case cannot proceed to a final hearing without it. And the appellant is not injured by denying him an appeal in this stage of the proceedings, because these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision, until the

Master's report comes in and is finally acted upon by the Court, and the whole of the matters in controversy between the parties disposed of by a final decree, and upon an appeal from that decree every matter in dispute will be open to the parties in this Court, and may all be heard and decided at the same time."

In *Pulliam* v. *Christian* (*supra*), the decree of the Circuit Court set aside a deed made by a bankrupt before his bankruptcy, directed the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, and to render an account before the Commissioner of the Court. In the argument of the cause on the question of jurisdiction it was said:

"The decree may be regarded as interlocutory in one sense—that is, as being made before the cause is finally ended and removed from the docket of the Court. But in respect to its own effect and operation, the decree is a final one, because it adjudges and determines the rights of the parties to the property in controversy, and all that remains now to be done is in execution of this decree. The finality of a decree does not depend upon its termination of the whole case, but upon its effect in settling the principles of the cause and adjudicating the rights of the parties to the subject in controversy. The decree in this cause performs all these functions. It settles all the principles of the cause. It adjudges the rights of all the parties, plaintiffs and defendants, to the subject; and it directs the defendants, who have the subject, to deliver it up to the plaintiffs. All that remains now to be done is simply in execution of that decree. Why should the parties be continued in expensive litigation in the Court below, as the consequence of the decree already pronounced, if that decree be erroneous, and when no such litigation and expense will be incurred if that decree be set aside, and a correct decree pronounced."

The Court said:

"This decree is final only as to the trust deed. All the matters arising under the trust are referred to a commissioner for a statement of the accounts to enable the Court to enter a final decree. There is no sale or change of the property ordered, which can operate injuriously to the parties. Under such circumstances, the decree not being final as to the whole matter in controversy, the appeal must be dismissed."

In *Barnard* v. *Gibson* (*supra*), the Circuit Court had made a decree sustaining the validity of a patent, and enjoining the defendant from infringing the same, and ordered a reference to ascertain and report the damages. An appeal was taken to this Court. It was argued in support of a motion to dismiss upon the ground that the

decree was not a final one, among other things, that it did not determine the amount of damages, nor adjudge them, nor settle any principles upon which they were to be computed, and that it did reserve a decision upon the rights of the respective parties, and did not give all the relief which was prayed for in the bill, and that whatever was asked and not granted was left undecided, because the bill was not dismissed as to that.

The Court said (when speaking of the case of *Forgay* v. *Conrad*, *supra*):

"The course of procedure in the Circuit Court was irregular, and the consequent injury to the defendants would have been irreparable. Effect should not be given to its final decrees by the Circuit Court, until the matters in controversy shall be so adjusted as to make the decree final. Any other course of proceeding will, in many cases, make the remedies by an appeal of no value. The decree in the case under consideration is not final within the decisions of this Court. The injunction prayed for was made perpetual, but there was a reference to a Master to ascertain the damages by reason of the infringement. The bill was not dismissed, nor was there a decree for costs. In several important particulars this decree falls below the rule of decision in *Forgay* v. *Conrad*. The bill was dismissed as to the principal matters in controversy, and there was a decree for costs."

And the appeal was dismissed.

In *United States* v. *Girault* (*supra*), the Court said:

"The practice in this Court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and to remand it to the Court below to be further proceeded in. This is also the rule in the King's Bench in England. It is there laid down in the second resolution that by the words in the writ, "*si judicium inde redditum sit*," &c., are intended not only a judgment in the chief matters in controversy, but also in the whole of them, so that the suit may be at an end. The reason given is that, if the record should be removed before the whole matter is determined in the Court below, there would be a denial of justice, as the King's Bench cannot proceed upon the matters not determined and upon which no judgment is given, and the whole record must be in the Common Pleas or King's Bench. It is entire, and cannot be in both courts at the same time. The writ is conditional, and does not authorize the Court below to send up the case, unless all the matters between all the parties to the record have been finally disposed of. The case is not to be sent up in fragments by a succession of writs of error."

The writ of error was dismissed, and the decision was affirmed in *Holcombe* v. *McKusick*, (20 *How.*, 552).

In *Craighead* v. *Wilson* (*supra*), the bill was filed in the Circuit Court by the complainants who claimed as heirs a part of the property of two deceased persons. The Circuit Court having ascertained the heirship of the claimants, and their relative rights in succession, referred the matter to a special Master to ascertain sundry facts in connection with the property. The Court said :

"The law intended that one appeal should settle the matter in controversy between the parties, and this would be the result in all cases when the appeal is taken on a final decree, unless it should be reversed or modified by this Court." The Court then referred to *Perkins* v. *Fourniquet* and *Pulliam* v. *Christian*, and said : "The above cases are sufficient to show the ground upon which appeals in Chancery are dismissed. To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit. To apply this test in all cases cannot be difficult. In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill is found, but the distribution among the parties in interest, depends upon the facts to be reported by the Master. Until the Court shall have acted upon this report, and sanctioned it, the decree is not final. There may be cases in which the attention of the Court has not been drawn to the character of the decree appealed from, but such an inadvertence cannot constitute an exception to the rule. The decision of the Court under the law establishes the rule which must govern in appeals from the Circuit Courts. The case of *Forgay* v. *Conrad* (6 *How.*, 201), was an appeal from an *interlocutory decree* which was sustained, though objected to ; but this decision was made under the peculiar circumstances of that case. It will be observed that, if the defendants principally interested could not take an appeal until the return of the Master, their property under the decree would have been disposed of beyond the reach of the appellate Court, so that an appeal would be useless. This was the principal ground on which the appeal was sustained, although it was stated that this part of the decree was final."

In *Beebe* v. *Russell* (*supra*), the Court said :

"We feel very confident no case has been decided by it, this Court, when the question of the finality of a decree or judgment has been brought to its notice, in which the distinction between final and interlocutory decrees has not been regarded, as it was meant to be by the legislation of Congress, and as it was understood by the Courts of England and this country before Congress acted upon the subject. A decree is understood to be interlocutory, whenever an enquiry as to a

matter of law or fact is directed preparatory to a final decision. A decree final decides and disposes of the whole merits of the case, and reserves no further questions or directions for the future judgment of the Court so that it will not be necessary to bring the case again before the Court for its final decision. It is a final decree. It is true a decree may be final, although it directs a reference to a Master, if all the consequential directions depending upon the result of the Master's report are contained in the decree, so that no further decree will be necessary upon the confirmation of the report to give the parties the entire and full benefit of the previous decisions of the Court." (This last paragraph is a quotation from the head note in the case of *Mills* v. *Hoag*, 7 Paige, 18.) What the Chancellor said in that case was as follows: "The decree was final and not interlocutory, as it finally disposed of the subject of litigation so far as the Court was concerned. Chief Justice SAVAGE defines a final decree to be the last decree which is necessary to be entered to give the parties the full and entire benefit of the judgment of the Court. The decree in this case comes within that definition, as no further questions or directions are reserved for the future judgment of the Court, and although some further proceedings are to be had before a Master to carry into effect the decree, all the essential directions depending upon the result of those proceedings are given in the present decree." The Court, in *Beebe* v. *Russell*, continued—"The object of the law and the interpretation of it by this Court is to prevent a case from coming to it from the Courts below, in which the whole controversy has not been determined finally, and that the same may be done in this Court. We say, "in which the whole controversy has not been determined." Wherever it has been, and ministerial duties are only to be performed, though that be to ascertain an amount due, the decree is final. But the reference of the case to a Master, to take an account upon the evidence and from the examination of the parties and to make or not to make allowances affecting the rights of the parties, and to report his results to the Court, is not a final decree, because his report is subject to exceptions from either side, which must be brought to the notice of the Court before it can be available. It can only be made so by the Courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment. In *Forgay* v. *Conrad*, the decree given by the Court below was adjudged by this Court to be final, and to give this Court jurisdiction of it; but it was so upon the ground that the whole merits of the controversy between the parties had been determined, that the execution had been awarded, and that the case had been referred to a Master simply for the purpose of adjusting the accounts. The fact is, the order of the Court in that case referring it to a Master was peculiar, making it doubtful whether it could in any way control or qualify the antecedent

decree of the Court upon the whole merits of the controversy, or modify it in any way except upon a petition for a rehearing."

In *Farrelly* v. *Woodfolk* (*supra*), the bill was filed for the purpose of obtaining title to certain lands. The Court decreed that the defendants should procure the legal extinguishment of a lien and encumbrance which existed upon the lands, and convey them to the complainant. The decree also contained a reference to a Master with instructions. The defendants appealed. The Court said :

"This case having been submitted to the Court upon printed argument, we find from an examination of the records that the appeal has been prematurely taken from an interlocutory, and not from a final decree. The Master is directed to call for and examine on oath any of the parties to this suit, and to make a report to this Court. This is so obviously an interlocutory decree that we do not think it necessary to examine it in detail to show that a further and final decree is necessary to give to the complainant any of the advantages to which the Court, in its previous directions, has declared him to be entitled."

In *Thompson* v. *Dean* (*supra*), the decree directed that Dean, the defendant below and appellant here, forthwith to transfer upon the books of the Company certain shares of stock. It then directed further that an account be taken as to the amount paid and to be paid for the stock, and as to dividends accrued and to be credited under the contract between the parties. The Court said :

"In this case the decree directs the performance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferee with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on the decree for sale. * * * We think that the current of decisions fully sustains the rule laid down by the late Chief Justice in the case of *Forgay* v. *Conrad*, and which we again declare in his own language : "

"When the decree decides the right to the property in contest, and directs it to be delivered up to the complainant, or directs it to be sold, or directs money to be paid to the complainant, and the complainant is entitled to have the decree immediately carried into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this Court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the questions between the parties pursuant to the decree passed."

It is apparent from the drift of these decisions that it is the decree upon exceptions to the Master's report which is considered by this Court as final. But that this is so was more especially stated in *Fourniquet* v. *Perkins* (16 How., 82), in which the Court said:

"This case came before the Court some years ago on an appeal from an interlocutory order of the Circuit Court, which stated that the appellants were entitled to recover certain claims set out in their bill, and directed an account to be taken by a Master. The appeal was dismissed, and the cause was remanded to the Court below, with directions to proceed to a final decree. Upon receiving this mandate the Circuit Court proceeded to take the account upon the principles stated in its interlocutory order, and, when the report of the Master came in exceptions were taken to it on both sides. At the argument of these exceptions it appears that the Court reconsidered the opinion which it had expressed on the merits in the interlocutory order, and, believing that opinion to be incorrect, dismissed the complainant's bill. The case now before us is an appeal from that decree. The counsel for the appellants object to the decree of dismissal because it was made at the argument upon the exceptions to the Master's report, and as contrary to the opinion on the merits expressed by the Court in its interlocutory order. This objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and all previous interlocutory orders in relation to the merits were open for revision, and under the control of the Court. If the Court below, upon further revision or examination, changed its opinion after passing the order, it was its duty to correct the error."

This was reaffirmed in *Railroad Company* v. *Swazey* (23 *Wall.*, 409), in which the Court said:

"An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled, and nothing remains to be done by the Court but to make the sale and to pay out the proceeds. This has long been settled. The sale in such a case is the execution of the decree. By means of it the rights of the parties as settled are enforced. But to justify such a sale without consent the amount due upon the debt must be determined, and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the Court. A reference to a Master to ascertain and report the facts is not sufficient. A Master's report settles no right. Its office is to present the case to the Court in such a

manner that intelligent action may be there had, and it is this action by the Court, not the report, that finally determines the rights of the parties. With these well-settled principles as our guide, it is easy to see that the decree here appealed from is not final. The amount of the debt which the State must pay in order to stop the sale has not been determined."

In *Green* v. *Fisk* (103 *U. S.*, 518), the plaintiff in the Court below alleged that she was the owner of one-half of the property described, and prayed a partition. The Court decreed that she was the owner of one-half of the property, and referred it to a Master to proceed to partition according to law. An appeal was taken, and a motion made to dismiss.

The Court said :

"A decree cannot be said to be final until the Court has completed its adjudication of the cause. * * * The Master was in everything to proceed under the direction of the Court. He had no fixed duty to perform. He was the mere assistant of the Court, not in executing its process, but in completing its adjudication of the partition which was asked. There are still questions in which the parties have each a direct interest, and they must be determined judicially before the relief has been granted which the suit calls for. In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds, is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the Court, and simply enforces the rights of the parties as finally adjudicated. Here, however, such is not the case, because still the Court must act judicially in making the partition it has ordered. What remains to be done is not ministerial, but judicial. The law has prescribed no fixed rules by which the officers of the Court are to be governed in the performance of the duty assigned to them. The Court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition if made in kind, or directed a sale by the ministerial officers, and prescribed the rules for a division of the proceeds. Appeal dismissed."

It is very clear, as has been already said, that the appellee cannot have the just and full benefit of the decree appealed from until the coming in of the Master's report. The decree declares it to be the duty of the appellant "to afford, and to have afforded, such facilities to the plaintiff as are herein specified for a just and reasonable compensation." This covers both the past and the present, and, if the Court below

should adopt the Master's report, it may apply it to the future also. But the Court does not decide what such just and reasonable compensation is. It refers that question to the Master upon the evidence already in, and authorizes him to report what was "a reasonable compensation to be paid by the plaintiffs to the defendant, together with the evidence." Until that report comes in the appellant cannot have the full benefit of the decree. The entire scheme, both of the decree appealed from and of the modified decree, looks to further action upon this vital question by the Court below ; and until that Court has settled the rate of compensation, including the disputed question of packed parcels, it has not finally decided the issues raised by the pleadings, or advised the appellee whether it can have any benefit at all from the decision in its favor upon the first question of law involved. The rate to be established by the Master and ultimately to be adopted, may be so onerous as to prevent the appellee from having any benefit whatever from the decree appealed from.

VII.

The policy of the law and the decisions of the Court are alike adverse to fragmentary appeals.

In *The Palmyra* (*supra*), the Court said:

"And we are of opinion that the cause cannot be divided so as to bring up successively distinct parts of it."

In *Canter* v. *Am. Ins. Co.* (3 *Peters*, 318), the Court said:

"It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the Legislature in giving appellate jurisdiction to this Court upon final decrees only, that causes should not come up here in fragments upon successive appeals. It would occasion very great delays and oppressive expenses."

In *Young* v. *Smith* (*supra*), the Court said:

"It is plain that it (the decree) does not dispose of the whole matter in controversy between the parties, and if an appeal could now lie upon the decree already rendered, an appeal could also lie from time to time from any future decree of distribution of any assets which might be collected after the former decree *toties quoties*, without any

final decision being made of all the matters in controversy. In our judgment this would be against the clear import and intention of the Acts of Congress, which were designed to give an appeal only from a decree final upon the whole matters and merits of the controversy."

In *Crosby* v. *Buchanan* (23 *Wall.*, 453), the Court said:

"Cases cannot be brought to this Court upon appeal in parcels. We must have the whole of a case or none. The Court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed, but until all the rights of the parties have been finally passed upon and settled, this cannot be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree."

The authorities cited clearly establish the right of a party to bring up on appeal the Master's report, the exceptions thereto and the rulings of the Court below thereon. If two appeals are not allowable, how can that be done in this case. It may well be assumed that both parties would like to be heard in this Court upon the rate of compensation and the value of the accessorial service. It may well be that both parties would like to be heard in this Court upon the question of overcharges and damages claimed by the appellee, and referred to the Master to decide. It was necessary for the appellee to make its claims in the Court below, as it did, otherwise it would have been adjudged to have waived them.

In *The Santa Maria* (10 *Wheat.*, 444), the Court said:

"Every existing claim which the party had omitted to make at the hearing upon the merits and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings; and, when a decree has been made which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims which might have been attached to it by the Court, if they had been previously brought to its notice."

If the parties would like to be heard in this Court upon the rate of compensation—including the question of packed parcels—the value of the accessorial service—the amount of overcharges—the amount of damages—and the amount of the trust fund—how, if successive appeals are not allowed, can they get a hearing in this Court?

It is true that there are suggestions in the authorities that a second appeal will lie, and there are cases in the reports

which show that a second appeal has been taken and has been entertained by this Court, but in this case the duties of the Master are in course of performance, and undoubtedly will be concluded and passed upon by the Court below long before the expiration of the four years which must probably elapse before this cause will be reached in its regular order by the Court. However much the parties may desire this Court to revise the action of the Master and the Court below, they cannot, if the decree appealed from be adjudged to be final, secure such revision. True, either might take a second appeal, but what would such second appeal bring up?

In *Supervisors* v. *Kennicott* (94 *U. S.*, 499) the Court said:

"Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this Court."

That is, if the decree appealed from be a final one, and this Court, four years from now, affirms it and sends its mandate to the Court below, and the Master has made his report, and exceptions have, within one month (Rule 83), been filed by the parties, and the Court below has passed thereon, both parties will be remediless.

It cannot be assumed that the Master will procrastinate the proceedings so that the proposed difficulty will not arise. Such a presumption requires too long an interval, and assumes that he will violate the provisions of Rule 75, which declares it to be his duty—

"to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the Court, or a Judge thereof, for an order to the Master to speed the proceedings and to make his report"

The possibility that both parties may be deprived of the right to an appeal from the decree upon the Master's report, ought not to be without weight in determining whether the decree appealed from is a final one.

VIII.

The decree appealed from finds its parallel in decrees in patent cases. Such decrees, under the authorities cited, are

not final until the Master's report comes in and is confirmed by the Court. The confirmatory decree is regarded as a final one, though as matter of fact it adds nothing to the interlocutory decree save that it adjudges the amount of damages or profits and awards execution therefor. When the interlocutory decree is for the plaintiff, it finds that the plaintiff is the owner of the legal right conferred by the patent; that the patent is valid; that the defendant has infringed; and awards a perpetual injunction and reference to a Master to compute the damages and profits. Such decree is not appealable, though it settles everything adversely to the defendant except the question of damages and profits. It would be very desirable for him to bring up the question immediately whether such injunction ought to have been granted. But this Court requires him to wait for the confirmatory decree before it will allow him an appeal to bring up that question. The hardship resulting from the injunction has not availed to persuade this Court that the interlocutory decree was a final one, although on an appeal the Court sometimes reverses the interlocutory judgment by dismissing the bill and thus terminating the injunction.

But the Court does not always award an absolute injunction. It sometimes finds the plaintiff's right under his patent, and that the patent is valid, and that the defendant has infringed, but from motives of public policy, or the peculiar equities of the case, it grants the injunction, only so long as the defendant shall see fit to refrain from paying a license fee or damages thereafter to be found or assessed by a Master, and which the Court adjudges to be a full compensation to the plaintiff, both prospectively and retrospectively. Such cases are illustrated by *Dorsey* v. *Marsh* (6 *Fisher*, 401); *Hodge* v. *Hudson Co.* (6 *Blatch.*, 172); *Howe* v. *Morton* (1 *Fisher*, 602); *Ballard* v. *Pittsburg* (12 *Fed. Rep.*, 786); *Am. Co.* v. *Glens Co.* (8 *Blatch.*, 533); and the list might be extended.

Suppose that the plaintiff insisted that his patent right was under the Constitution, the Revised Statutes, and the language of the grant an exclusive right to make, use and vend, and that the Court had no power against his will to make a decree by which the defendant could continue to use by paying a license fee, or damages to be assessed by a Master, and should thereupon bring his appeal from the decree giving the defendants the privilege of using to this Court, and ask it to reverse the decree, and to make the injunction perpetual, would this Court

entertain that appeal? Clearly not within the authorities cited. Those refused to entertain an appeal from the ordinary patent decree, not because the injunction had been made perpetual, but because there was an unsettled question arising on the pleadings and pending between the parties which it required the Court below to decide, so that the decision of this Court would finally dispose of the controversy.

In this case it is believed, from the opinion of the Court below, that it was the intention of the Court to adapt to this case the practice obtaining in patent cases, and to determine simply that the appellant should not enforce its threatened injunction of excluding the appellee so long as the appellee should be ready and willing to pay a fair and reasonable compensation for the privilege which it enjoyed. It said, in substance, to the appellant, "We do not think that the law permits you to destroy the appellee's business, and we refuse our assent to your so doing so long as the appellee is willing to pay a fair and reasonable compensation. That the business may proceed, we provisionally fix a sum for the appellee to pay, and under the tenth clause of our decree we send it to a Master to determine what are just and reasonable rates, or in other words, to determine whether what the appellee has been paying is unjust and unreasonable. On the coming in of the Master's report we will then hear you upon all the evidence already taken, and which we have not now examined, and upon all which the Master may report, and then finally determine what shall be the permanent rate of compensation to be finally fixed by the Court, and to apply since May 21, 1880."

This was all that the Court said. If, in the supposed patent case, the plaintiff could not appeal, for the reason given in the authorities cited, so, by a parity of reasoning, cannot the appellant successfully maintain that the decree of March 25, 1882, was the final decree in the cause, an appeal from which will be sustained by this Court.

IX.

The decree appealed from was pronounced at the March Term of the Circuit Court of 1882. Until the end of that term, that decree was under the complete and entire control of the Court, and subject to be reviewed or modified, and was not, therefore, to be regarded as absolutely final until the end of the term.

This was decided by the Court in *Railroad Co.* v. *Bradley* (7 *Wall.*, 575); *Bassett* v. *United States* (9 *Wall.*, 38); *Ex parte Lang* (18 *Wall.*, 167); *Bronson* v. *Shueten* (104 U. S., 415), in which the Court said:

"It is a general rule of law that all the judgments, decrees, or other orders of the Courts, however conclusive in their character, are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and that they may then be set aside, vacated, modified or annulled by that Court."

X.

The decree of the 5th of June, 1882, was made at the March Term of 1882. It purports upon its face to have been made "at a regular Stated Term of said Court." It was therefore a proceeding in Court and by the Court, as contra-distinguished from a Judge thereof. It was required to be made by the Court. Indeed it could not have been made by a Judge at Chambers, because the authority to act at Chambers would seem to be limited under Rule 3, to "proceedings preparatory to the hearing of the cause upon its merits."

The decree of the 5th of June, 1882, is therefore a decree of the Court below of equal dignity as the decree of March 25, 1882. The question now arises, what was its effect upon the decree appealed from?

XI.

The decree of the 5th of June, 1882, modified the decree of March 25, 1882, and is to be considered in legal effect as if engrafted thereon, and thereby the two decrees became one decree, and, if the decree of March 25th, 1882, was a final one, it ceased to be such after the 5th of June, 1882, and then became an interlocutory decree, pure and simple.

First.—The decree recites the title of the cause and thereby shows that the cause was still pending under its original number, No. 1667. It recites that it was made upon a petition which the silence of the defendant in not answering it admitted to be true.

It recites that "now at this day come the parties," by which it appears that the parties were then and still are in Court; and then it avers, "and the petition of the plaintiff filed herein June 3, 1882, having been fully considered by the Court, it is ordered," &c. By this it appears that the order was made upon a petition which had been deliberated upon by the Court.

The order then indissolubly connects itself with the decree of March 25, 1882, because it refers it to a Master in its own language, "to investigate, examine, and report to the Court under said decree of March 25, 1882." This, therefore, connects the decree of June 5, 1882, with the decree of March 25, 1882, in such manner that the two no longer remain separable.

The use of the word "said," in the quotation above given, confirms this. How did the "said" decree of March 25, 1882, get before the Circuit Court on the 5th of June, 1882, if that decree had been properly appealed from and was pending in this Court alone? How did the Court below get jurisdiction to entertain the petition and to proceed in the cause if the suit had been removed by a proper appeal? Obviously the Court below did not regard the decree of March 25, 1882, as final, or as withdrawn from its jurisdiction by an appeal. It obviously considered that it had rightful jurisdiction to proceed under said decree, and to effectuate the investigation which that decree left open.

The petition brought the fact before the Court that the March Term was still pending; for it said on its face, "In Equity, March Term, 1882."

It also brought before the Court the "said" decree, because it said:

"In the matter of the reference authorized by the decree of the Court in the above-mentioned cause, entered at the present term of the Court, and on the 25th day of March, 1882."

It recited the decree in full, and it then prayed as follows:

"Your petitioner now here respectfully prays the Court to grant to it the benefit of the reference authorized by Sections V. and X. of said decree, so entered in said cause March 25, 1882."

Section V. of the decree declared it to be the duty of the defendant to carry the express matter of the appellee and the messengers or agents in charge thereof at a just and reasonable rate of compensation, and that such rate was to be found and established as a unit, and was to include as well the transportation of messengers as of the express matter in their charge. That this unit rule was the correct one was decided by this Court in *Union Pacific Co.* v. *United States* (104 *U. S.*, 668), where the Court said, in reference to the claim by the Railroad Company for compensation for carrying the mails and the messengers in charge thereof, as follows:

"It will be just and necessary to include in that estimate and finding an allowance for compensation for the transportation of mail agents and clerks; not, however, as a separate item of service to be paid for necessarily at the rates which might reasonably be charged if that were the whole; but as a part of and incident to the entire service rendered in the transaction of the postal business required by the Government, for which as an entirety the compensation should be made at fair and reasonable rates."

Section X. of the decree of March 25, 1882, is the one already quoted, giving the plaintiff "leave to apply for an investigation," &c.

The Court below, therefore, had before it on the 5th of June, 1882, the petition which recited the substance of the bill and answer and thereby showed the issues raised as to rates and value of accessorial service, and the decree of March 25, 1882, and it then and there proceeded to make a further decree, which was called an order only in the same sense in which the decree in a patent cause appointing a Master is an order.

Second.—That the decree of the 5th of June, 1882, did operate to suspend and modify the decree of the 25th of March, 1882, and to terminate its finality, if it ever was final, is conclusively established by the case of *Brockett* v. *Brockett* (2 *How.*, 238), in which the Court said:

"A motion has been made to dismiss this appeal upon several grounds. * * * The next ground is that an appeal has been taken from the refusal of the Court below to open the former decree rendered for the appellant. It is plain that no appeal lies to this Court in such a matter, as it rests merely in the sound discretion of the Court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first decree, which was a final decree rendered by the Court. That decree was rendered on the 10th of May, 1843. During the same term a petition was filed by the defendant on the 26th day of the same month to have the final decree opened for certain purposes; and the Court took cognizance of the petition and referred it to a Master Commissioner. His report was made on the 9th of June following, the same term still continuing, and the Court then refused to open the final decree; and from this refusal, as well as from the final decree, the defendant took an appeal and gave bond with sufficient sureties on the 15th of the same month, and the appeal was then allowed by the Court. Now, the argument is that as the original final decree was rendered before the appeal, it could not operate as a supersede as or to stay execution on the decree, because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the Court, and it did not take effect until the 9th of June; and the appeal was duly taken and the appeal bond given within ten days from this last period."

The decree of June 5, 1882, opened the decree of March 25, 1882, even if it had been final, to let in proof material to the issues and required for the further action of the Court, and until such action has been had there cannot be any final decree herein.

XII.

The appeal should be dismissed.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Of Counsel for the Motion.

November, 1882.

108-24

OFFICE SUPREME COURT U. S.
FILED
JAN 2 1899
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO., - - - *Appellee*,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *Appellant*.

BRIEF FOR APPELLANT ON MOTION TO DISMISS APPEAL.

BROADHEAD & HAEUSSLER,
Attorneys.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

"A motion has been made to dismiss this appeal upon several grounds. * * * The next ground is that an appeal has been taken from the refusal of the Court below to open the former decree rendered for the appellant. It is plain that no appeal lies to this Court in such a matter, as it rests merely in the sound discretion of the Court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first decree, which was a final decree rendered by the Court. That decree was rendered on the 10th of May, 1843. During the same term a petition was filed by the defendant on the 26th day of the same month to have the final decree opened for certain purposes; and the Court took cognizance of the petition and referred it to a Master Commissioner. His report was made on the 9th of June following, the same term still continuing, and the Court then refused to open the final decree; and from this refusal, as well as from the final decree, the defendant took an appeal and gave bond with sufficient sureties on the 15th of the same month, and the appeal was then allowed by the Court. Now, the argument is that as the original final decree was rendered before the appeal, it could not operate as a supersede as or to stay execution on the decree, because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the Court, and it did not take effect until the 9th of June; and the appeal was duly taken and the appeal bond given within ten days from this last period."

The decree of June 5, 1882, opened the decree of March 25, 1882, even if it had been final, to let in proof material to the issues and required for the further action of the Court, and until such action has been had there cannot be any final decree herein.

XII.

The appeal should be dismissed.

GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
CLARENCE A. SEWARD,
F. E. WHITFIELD,
Of Counsel for the Motion.

November, 1882.

108-21

OFFICE SUPREME COURT U.S.
FILED
JAN 2 1909
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO., - - - *Appellee*,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *Appellant*.

BRIEF FOR APPELLANT ON MOTION TO DISMISS APPEAL.

BROADHEAD & HAEUSSLER,
Attorneys.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

IN THE

Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO., - - - *Appellee*,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *Appellant*.

Motion to Dismiss Appeal.

BRIEF FOR APPELLANT.

A motion is made by the appellee to dismiss this appeal for want of jurisdiction in this court, and because the decree in this case was not final.

The case is a peculiar one: it is a bill in equity asking the court, in substance, to determine how business should be conducted between two transportation companies — an express company and a railroad company.

It is an application for what may be called a mandatory injunction, asking the court to enjoin the defendant from refusing to do certain things, and this application is based

upon the assertion in the bill that the complainant is, under the law, entitled to certain privileges and facilities in the conduct of its business, which the defendant has denied or is about to deny to it; that the public is interested in the enjoyment by the complainant of those privileges and facilities; that the law imposes upon the defendant the duty of affording those facilities to the complainant; that they had been enjoyed by the complainant for a long time; that complainant had made extensive preparations for carrying on their business in this particular way, and they demand that they shall continue to have those facilities, and offer to pay a reasonable compensation to defendant for this continued enjoyment; and that if complainant and defendant should, during the pendency of the suit, disagree as to what is reasonable compensation, that the complainant be permitted to bring the matter before the court for its decision.

It appears that in the spring of 1880, the complainant was doing an express business over the St. Louis, Iron Mountain and Southern Railroad, under the provisions of two written contracts — one made April 30th, 1872, between the Iron Mountain Railroad Company and Adams Express Company, which contract was sold by Adams Express Company to the complainant; and another contract, made February 1st, 1874, between the Cairo & Fulton and the Cairo, Arkansas and Texas Railroad, which railroad companies were afterwards, to wit, May 1, 1874, consolidated with the Iron Mountain Railroad Company, forming what is now called the St. Louis, Iron Mountain and Southern Railway Company, the defendant in this suit, and thus it became the owner of both contracts with the complainant — one made by complainant with the railroad company, and the other made by Adams Express Company and assigned to complainant.

By the terms of those two contracts they might be terminated by either party on sixty and thirty days' notice respectively.

These notices were given to the complainant by the railroad company on the 26th of March and the 23d of April, 1880, that the contracts would be terminated on and after a certain date; and on the 15th of May, 1880, the railway company notified the express company that the railway company "had determined to transport all express matter and transact all express business on its own account, and through and by its own officers and agents, on and after the 1st of June next, on its own cars and over its own roads."

On the 21st of May, 1880, the bill in this case was filed.

The bill avers in substance:

1. That the complainant has been and is doing an express business.

2. That the railroad companies cannot do an express business; that they are not only unable, but unwilling to perform it in a manner to serve the public; and that by usage they have surrendered it to the express companies.

3. That the express companies have built up their business upon the express understanding that the railroads would afford all the facilities needed by the express companies for the transaction of their business; or upon the knowledge and belief that the public, through the express companies, had a legal right to compel the granting thereof, and that no railway company has ever had the ability to assume such obligations to the public for the transportation of express matter as those assumed by the express companies.

4. That the principal business of the express companies has been as a medium of exchange of money and collections of negotiable securities, and the transportation of express packages of greater or less value, or where the price was to be collected from the consignee; that railroad companies did not afford these facilities.

5. That the government of the United States has availed itself of these facilities, and that the express companies have been created by the public as their instrumentalities for the transmission of public and private money; and the necessity for their existence is as great as the necessity for the existence of the ordinary vehicles of commercial intercourse.

6. That the defendant has all the conveniences needed by the Southern Express Company for the transaction of its business.

7. Relying upon the duties and obligations imposed upon the railway company, by law as well as by the *contract*, to afford to plaintiff equal and indiscriminating opportunities and facilities of transportation, and in a manner demanded by the conveniences and necessities of the public, and established by the necessities of the railroad companies, plaintiff made large investments of money in building up its business at stations along the railroad, and in establishing other connecting routes for business, and has built up and now owns and enjoys an express *business*, and *prestige* and *good will* of great value.

8. That plaintiff has provided horses and wagons, drivers, iron safes, and other conveniences to collect and deliver express matter, using its own means and agencies alone.

9. That it has had occasion to forward large sums of money, for which defendant, having its property heavily mortgaged, affords no prompt security in case of loss; and so safety has demanded, and *defendant* has accorded, according to the usage of railroad traffic, the means of forwarding such sums of money in the special care and custody of plaintiff's own agents; otherwise, plaintiff would be denied the opportunities of transporting such money ! ! !

10. That its interest and the preservation of its valuable property demands that it shall continue to have the facilities heretofore enjoyed, and offers to pay a reasonable compensation therefor; and avers that, by reason of the premises and force of the statutes of Missouri, the duty is imposed upon the defendant to always afford plaintiff the means and the facilities of forwarding and transporting, in the *manner established as aforesaid* by *the usage of the express business*, upon reasonable terms, its express matter and *messengers*.

11. That the railroad companies have classified freight according to law, and that the rates of toll or compensation therefor have been provided by law, and that the same cannot be lawfully exceeded by defendant in its charges to complainant, or to the public whom the complainant represents.

12. That it is in the daily custom of making with its own horses and wagons all the collections and deliveries of express freight, as between the public and the railway lines of defendant, which the public cannot conveniently make on its own behalf; that it does not require from defendant any similar service, nor can the defendant lawfully charge it therefor.

13. That complainant will be entitled to have all its express matter transported over defendant's railway at the rates of freight specially provided by law, and by the railroad companies; and that if defendant shall during the pendency of this suit or hereafter undertake to do its own express business, defendant can be legally required to deduct from the charges to be made by it to the public for transportation of express matter, upon all express matter transported by it for the Southern Express Company, a just and reasonable compensation for the accessorial services

rendered by the Southern Express Company, beyond and off the lines of defendant's railway, in the collection of goods from shippers or consignors, and the delivery of goods to consignees by means of horses and wagons, and which accessorial service the Southern Express Company does not require at the hands of defendant.

14. Offers to pay reasonable freight and charges and asks that plaintiff be permitted to do an express business on the line of defendant's road.

15. That a court of equity has the power to compel defendant to keep within the limits prescribed by law, and to proceed by injunction to prevent illegal injury or destruction to the rights of property of others.

Wherefore complainant prays:

1. That during the pendency of the suit the defendant may be restrained from interfering with the facilities now enjoyed by the Southern Express Company, now accorded to it; from interfering with its messengers; from refusing to receive and transport, in the same manner as defendant is now doing, the express matter and messengers of the Southern Express Company; or interfering with its business or present relations with defendant in any manner whatever, so long as the express company is willing and ready to pay according to all legal rates therefor.

2. That if during the pendency of the suit any dispute should arise between the parties as to what is reasonable compensation for transportation, the complainant may be permitted to bring the matter before the court for its decision.

3. That defendant may be required to transport the express matter, safes and messengers of the Southern Ex-

press Company by the same trains, and with the same accommodation as it may transport its own express matter; that it be required to transport express matter for statutory tolls and compensation as provided by law; that defendant may be required to make a reasonable rebate or reduction from its charges to the Southern Express Company, to be fixed by decree of court, by reason of its performance of accessorial service as specified.

4. That a permanent injunction may issue to the same purport and effect as is prayed in regard to a preliminary injunction.

5. And for general relief.

ANSWER.

The defendant denies generally and specifiically the material allegations of the bill.

Admits the statements made in paragraph twenty (20) of the bill.

Admits the statement made in paragraph 28 of the bill, and that the letter set out therein was sent to and received by defendant at or about the time stated.

Admits the statements contained in paragraphs 31 and 32 of the bill.

Admits the statements contained in paragraph 51, and the giving of the notice set out therein, but denies that said notice was given in pursuance of any combination and agreement between the defendant and the representatives of the railroad companies mentioned in paragraph 39 of the bill.

Admits the statements made in paragraph 45, that the railroad companies have classified freight, and that the rate of toll has been provided by law, but denies that the same cannot be lawfully exceeded by defendant in its charges to complainant or the public; and says that defendant's tariffs

for express rates have not been fixed, and that the rates fixed by law for railroad freights do not embrace express freights or tolls; that no such rates have been fixed by the railroad commissioners.

Defendant avers that under its charter granted on March 3d, 1851, it is authorized to transport passengers, goods, wares and merchandise of all kinds, lumber, produce and other articles usually transported on railroads, and to charge and receive such tolls and freights for transportation as shall be to the interest of the company; and that the directors of the company are authorized to establish such tolls and to alter the same from time to time.

Defendant avers that since the 1st of June, A. D. 1880, it has formed and organized an express department of its road, and has been, and is now receiving and transporting over its lines, and delivering freight commonly known as express freight, as it has a right to do; that the express business is a legitimate business of defendant; that it can serve the public without the intervention of the Southern Express Company, and can serve it as well; and that it is unjust to the stockholders of the company to permit a third party to make use of the property of defendant and the services of its employees, to reap the profit for the transportation of freight which belongs to it.

That other railroad companies have for years past been engaged in transporting express matter over their roads, with as much dispatch and promptness, in as safe and secure a manner, and with as much satisfaction to the public as express companies have been and are doing.

Defendant avers that the compensation it has received from complainant for transportation over its lines during the time of the existence of the contract, was inadequate for the service performed; that the conduct of complainant in the management of its business, its intervention between defendant and its customers, its taking a large amount of freight which was not properly express freight, its contin-

ued violation of its contracts under which it was permitted to do an express business, and its concealment and withholding true and correct reports of the weights of express freights transported over defendant's line of road, occasioned great damage to defendant, and compelled the termination of said contract.

Defendants aver that, as a common carrier, it owes to complainant no other duty than to any other person desiring to transport freight over its road. The defendant does not claim the right to exclude the transportation of express matter of complainant over its road, and has always been willing, and is now willing, to transport any express matter of complainant over said road; but that it claims the right to transport express matter in spaces in its cars selected by itself, and under the supervision, care, and control of its own employees, and denies that complainant has any right to have allotted to itself any particular space in defendants cars, or to permit its messengers to take charge of its express freight.

ARGUMENT AND AUTHORITIES.

It will be perceived that the complainant merely asserts a right which it avers has grown up and it has acquired by usage, and by the acquiesence of defendant; which it has enjoyed for a long time; which has become beneficial to it and to the public; that it is a lawful right; that it consists of the facilities and accommodations it has *heretofore* enjoyed in the conduct of the express business on the lines of defendant's roads; that it is willing to pay a reasonable compensation for those facilities and accommodations; that it is about to be deprived of them by the act of defendant; and that the defendant in that respect be enjoined. It is simply an application for an injunction; no other relief is asked; nor from the nature of the suit could any other relief be granted.

There is no averment of what is a reasonable compensation, nor that defendant has charged or received an unreasonable compensation. It says that the rates of toll and compensation have been provided by law, but does not say what the law provides in this respect; it simply asks the court to lay down a rule of law and to require the defendant to conform to it in its business with the company. It is true it asks in the prayer of the bill, that if during the pendency of this suit any dispute should arise between the parties as to what is reasonable compensation for transportation, the complainant may be permitted to bring the matter before the court for its decision—during the pendency of what suit? Why, of course, the suit to establish these rights, and to specially enjoin the defendant from violating them or by its mandate to order that the facilities asked for should be granted by the defendant to the plaintiff—not a suit to recover damages for the violation of such an order, or mandate, or perpetual injunction—if so, the suit is a continuing one, always pending.

Until the final judgment in this case, during what we call the pendency of the suit, there was no application to the court for a rule to fix the measure of compensation, to determine what in any given case, or in general, was a reasonable compensation.

The preliminary injunction, or first restraining order made by the court, ordered:

"That the defendant, its officers, agents, &c., be enjoined and restrained, until the final determination of this cause, from preventing the plaintiff's enjoying the same facilities in the conduct of its express business, permitted to any other express company, or exercised by the defendant itself, on the payment by the plaintiff of a reasonable compensation therefor."

This was on the first day of June.

Then, on the 6th of November, 1880, a further order was made, modifying the original preliminary order. This

order was substantially the same, as to compensation, as the first; that is, that it should be reasonable, and that defendant should carry for reasonable compensation. (See p. 8 of plaintiff's motion in this case.) There were other matters in it, however; it embraced an order in regard to accessorial services: it enjoined the defendant from making discrimination against plaintiff for return of empty kegs or packages, from charging plaintiff higher rates of freight than are charged against other express companies, and that it exacted for the service of its own department. It made a further order against preventing the transportation of express matter by plaintiff over defendant's road, and from requiring as a prerequisite the listing or disclosing by the plaintiff of the contents of packages presented for transportation, and of preventing the messengers of plaintiff, on the payment of passenger fare, from like accommodations, for the care and custody of plaintiff's shipments, as were accorded to the messengers of other express companies, or those engaged in like service for defendant. So that there never was any application for an order of the court fixing the rate of compensation, nor any rule or decision on the subject, except that it should be reasonable.

Now, taking the pleadings — bill and answer — and the motions and preliminary orders for the purpose of interpreting this case and ascertaining the issues, what is there in it?

The plaintiff in his brief says:

There are two issues of law, raised by the pleadings as originally framed:

(1.) Was it the public duty of the appellant to afford transportation and other needful facilities to the appellee, for the transportation of its express matter and messengers, and the conduct of its business, whereby the private right of the appellee might be subserved?

(2.) If so, what was "a fair and reasonable rate of compensation" to be paid by the appellee for such services by the appellant?

The first issue is fairly stated; but if the attorneys for the appellee mean by what was a fair and reasonable rate of compensation, that the court was asked to fix a given and absolute amount as a fair and reasonable rate of compensation, we say that no such issue was presented by the pleadings.

Nor is it true, as stated by counsel, that "*the prayers of the bill were directed specifically to the solution of the question*" as to what was "a fair and reasonable rate of compensation."

The bill simply avers:

"That the railroad company have classified railway freight according to law; that the rates of toll or compensation have been provided by law, and that the same cannot be lawfully exceeded by defendant in its charges to your orator." (See paragraph 45 of the bill.)

And see also plaintiff's brief, p. 38, in which he states, as the averment of the bill, viz.: "*a rate not in excess of the classified railway freights as provided by law*," &c.

And so the plaintiffs aver and so they pray, that "*a fair and reasonable rate of compensation*" shall be decreed to be a rate not in excess of classified railway freight.

And the court in its decree comes fully up to the averments and prayer of the bill, for it says (see latter part of section 11 of the decree) as follows:

"The said plaintiff paying for the services performed for it by the defendant, monthly, as herein prescribed, at a rate not exceeding fifty per centum, more than its prescribed rates, for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals; reserving to either

party a right at any time hereafter to apply to this court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed."

That is to say, the parties are not precluded from bringing another suit to modify this decree, it is like dismissing a bill without prejudice.

It is true, the court did not fix any given amount absolutely, nor was it asked to do so, but it did make a decree upon the issue presented, and that decree was final.

Judge Miller, in his opinion, says:

"8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay, and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment."

The truth is, that this matter of a fixed compensation is an afterthought; *it is not in the case*, and from the very nature of the service, it could not be fixed definitely and finally in advance. The whole of the bill shows that its object was to establish a right, and the right being established, a court of law could at any time after the service is rendered, determine what was a reasonable compensation for the services performed.

Counsel for appellee says, page 40 of his brief:

"If the appellant had been content to permit the court below to carry into effect, by its interlocutory decree, the suggestion of the opinion, there would have been no necessity for this motion."

We suppose that the court made this decree without the permission of the appellant or the appellee, and made it final and not interlocutory, upon the issues presented by the

pleadings, and not upon the great mass of irrelevant testimony with which the plaintiff has thought proper to encumber the record in the case.

Counsel for the appellee lays great stress upon the tenth paragraph of the decree, in which it is recited that inasmuch as it has been alleged by the complainant (where alleged? certainly not in any of the pleadings) that since the termination of the contract establishing the rate of compensation, and the service of the preliminary injunction, the defendant has, in violation of the injunction, made unjust discriminations against complainant, and charged unreasonable rates of compensation; therefore, it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, &c., and for the appointment of a master to take proof and report thereon.

This has nothing to do with the merits of the controversy presented by the pleadings, and is just about so much a part of the case as would be a proceeding for contempt by the issue of an attachment against the defendant.

The question of what is a final decree has been repeatedly passed upon by this court, and whilst this court has several times intimated that it is greatly to be desired that a decree should not only be *final*, but complete, before the case is brought up by appeal, yet we think that the authorities are clear to the effect that a decree such as this is both final and complete.

In Forgay v. Conrad, 6 Howard. p. 201, the court held: "That a decree of the court below, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to complainant; that one of defendants should pay a certain sum to complainant; that complainant should have execution; that a master should take an account of the profits of lands and slaves, and also an account of certain money and notes, and then concluding as follows, to wit: And so much of said bill as contains or relates to matters hereby referred to the master for a report

is retained for further decree in the premises; and so much of said bill as is not now, nor has been heretofore adjudged and decreed upon, and which is not above retained for purposes aforesaid, be dismissed without prejudice, and that said defendants do pay the costs''—was a final decree from which an appeal would lie.

This was on motion to dismiss the appeal because it was not final. Motion overruled.

In Barnard v. Gibson, 7 Howard, 657, the decree was held not to be final as there was no decree for costs.

In Whiting v. Bank of the United States, 13 Peters, 15, Judge Story, in holding that a decree of foreclosure of a mortgage and sale is to be considered in equity a final decree, before there has been any decretal order confirming the sale, says: ''The original decree of foreclosure and sale was final upon the merits of the controversy,'' and that the ''defendants had the right to appeal from that decree as final upon the merits as soon as it was pronounced''—referring to and approving the case of Ray v. Law, 3 Cranch, 179.

In the case of Thomson v. Dean, 7 Wall., 342, the Chief Justice delivering the opinion, says: ''We think that the current of decisions fully sustains the rule laid down by the late Chief Justice in Forgay v. Conrad,''—quoting from the language of the court in that case. The reasoning, he says fully vindicates this rule as a sound construction of the acts of Congress relating to appeals.

The opinion expresses the desire that appeals be taken only from decrees which are not only final, but complete.

''And it may be true (says the court) that under the influence of these considerations, the degree of finality essential to the right of appeal has been sometimes pushed quite to the limit of construction.

''In this case the decree determined the right to the property,'' and, as the court says, ''determined the principal matter in controversy between the parties, and since this

could not be changed, except by a new and distinct proceeding, it determined that matter finally."

The decree provided for an account to "be taken, and stated as to the amount paid and to be paid for the stock, and as to dividends accrued, and to be credited under contracts between the parties."

French v. Shoemaker, 12 Wallace, p. 86, was an appeal taken from a decree of the Circuit Court for the District of Virginia, rendered by Chase, Ch. J.

The decree of the Circuit Court was as follows:

"This cause coming on to be heard upon bill and answer * * * and upon the proofs, and upon being maturely considered, the court is of opinion that the equity of the *case is with the complainant in the original bill;* and, thereupon, do order, adjudge, and decree that James S. French, the defendant in the original bill, be perpetually enjoined and restrained from any use of the name or title of the president of the Washington and Alexandria Railroad Company, under any election to that office heretofore held, and from any action by himself or any attorney or agent to interfere with any proceedings for the reorganization of said company, under the contracts mentioned in said bill, dated the 6th of December, 1867, and from any proceeding whatever, not in accordance with said contracts, without prejudice, however, to the right of the said French to the stock assigned to him by the said contract, or to assess any claim he may have against said company reorganized under said contract, or against the said Shoemaker, or against the Adams Express Company, not in contravention of said contract, or to pursue, by proper proceeding in law or equity, any claim he may have in respect to the distribution of stock made in and by said contract, founded upon failure of consideration or other cause.

"*It is further ordered, adjudged, and decreed that the said defendant French pay the costs in this cause; and leave is given to either party to apply at the foot of the decree for such further order as may be necessary to its due execution, or as may be required in relation to any matter not finally determined by it.*"

This was held to be a final decree. Justice Strong, in delivering the opinion of this court in the case of Stowall v. Banks, 10 Wall. p. 586, says: "It cannot be maintained that a decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is not a final decree conclusive upon the parties. We do not (*say the court*), overlook the fact that in this instance the court, after having determined the sum due to each of the complainants and directed its payment, and after having awarded execution, went on to direct that the administrator be allowed as payment to the respective parties, to be deducted from the amounts therein adjudged to them, the principal and interest of any note held by him against either of them. It also directed that the several shares of the parties to whom the estate was awarded, should be subjected to rateable deduction for fees yet unpaid for collection of notes belonging to the administrator. *But we think the decree was not for this reason the less final.*

And further: "It is not unusual in courts of equity to enter decrees, determining the rights of the parties, and the extent of the liability of one party to the other, giving, at the same time, a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final; they give the successful party the full benefit of the judgment."

The case of Railroad Company v. Swasey, 23 Wall., p. 405, relied upon by appellee, does not vary the principles by this court in the cases above cited.

In this case the amount of the debt due was not ascertained; there was no order of sale; the amount of the debt and the proportion of stock applicable to its payment was still open for future adjudication; the court only held in that case that the plaintiff had a lien upon an equitable proportion of the stock, and that the lien may be enforced by sale if payment of the debt is not made; and yet the

amount of the debt is not ascertained, and the decree winds up by saying "*and this cause is held for further directions.*"

Of course this was no final decree in any sense of the term, and the court so held.

In Green v. Fish, 103 U. S., p. 518, the court found that Mrs. Fish was the owner of one-half of the property, real estate, but it was not divided, nor was it ascertained whether it could be divided. She had averred that a partition sale was necessary; that a division could not be made in kind; but there was no finding by the court upon these averments in the petition, and the court referred the matter to a master to "*proceed to* make partition according to law under the direction of the court." Held not to be a final decree.

In the case of Henry Bostwick, Receiver of National Bank of Fishkill, and others v. Theodore Brinkerhoff, error to the Court of Appeals of New York, and decided at the present term of this court, the Chief Justice delivering the opinion of the court, says:

"The rule is well settled and of long standing, that a judgment or decree to be final, within the meaning of that term, as used in the Acts of Congress, giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

Referring to the cases of

Whiting v. Bank of U. S., 13 Peters, 15;
Forgay v. Conrad, 6 Howard, 204;
Bronson v. Railroad, 2 Black, 531;
Thompson v. Dean, 7 Wallace, 345,

and other decisions of this court upon the question of what is a final decree. If the decrees of the court in the cases

last referred to did "*terminate the litigation between the parties on the merits of the case*," to use the language of the chief justice quoted above, then most assuredly the decree in the case now before the court, terminated the litigation between the parties on the merits of the case.

The rights, and facilities and accommodations claimed by the plaintiff, were accorded to it by the decree, that is to say, the court decreed that plaintiff should be permitted to do an express business on defendant's road in the manner, and with the accommodations and facilities claimed by plaintiff as belonging to that business, for a reasonable compensation, not to exceed a certain amount, and that was what was asked, and all that was asked, by the plaintiff, and in this respect the injunction was made perpetual.

The remedy asked in the bill was a preventive one; that is, first, to declare the rights of the plaintiff to be as claimed, and then by injunction to prevent the violation of the right.

The last averment in the bill is that a court of equity has the power to compel defendant to keep within the limits prescribed by law, and to proceed, by injunction, to prevent illegal injury or destruction to the rights of property of others.

Judge Miller, in delivering his opinion, doubts the right of the court to fix in advance the precise rates which the express companies shall pay, and the railroad companies shall accept; and the decree following the opinion, does not attempt to fix precise rates; nor do the proceedings of the court had subsequent to the decree, in which a master is appointed, contemplate the fixing of precise rates as a rule; on the contrary, they refer only to the alleged violation of a modified order of injunction made after the commencement of the suit, and which order was, by its terms, to continue in force only during the pendency of the suit.

Judge Miller, in his opinion, further says:

"I have no doubt of the right of the court to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment."

If, then, the business of the two companies is to continue indefinitely, and the plaintiff has an indefinite right to complain that the compensation charged is unreasonable, and the court must ascertain what is reasonable upon every complaint, and compel its payment by decree in each case of complaint, there never could be a final decree, and the judgment of the Circuit Court would become supreme over the rights of the parties.

The impossibility of fixing in advance precise rates of compensation, must be apparent to any one from the very nature of the business itself, when it is considered how many things affect the cost of transportation to the railroad company.

The reference to the Master in this case, was in regard to a mere collateral matter growing out of the suit, and did not in any way affect the merits of the controversy between the parties as presented by the pleadings.

In Bronson v. The Railroad Co., 2 Black. 529, Mr. Justice Davis, in overruling the motion to dismiss the appeal, on the ground that the decree was not final, said: "The object of the suit was to ascertain how much money was due on the security of the mortgage, and to sell the property unless the amount was paid. The court did find what was due and ordered a sale.

"The very purpose of the litigation which was initiated by Bronson & Souter was accomplished, and nothing remained for them to do, if they felt aggrieved by the finding of the court, but to appeal. Their right of appeal attached on the rendition of the decree. * * * It is said that some exceptions to the report of the Master were pending and undetermined when this decree was made, but those exceptions did not relate to any claims of Bronson and Souter; they

were collateral to the main purpose of the suit, and concerned the defendant alone. * * * This decree is not final in the strict technical sense of the word, for something yet remains for the court below to do. But as was said by Ch. Justice Taney, in Forgay *et al.* v. Conrad (6 Howard, 203): 'This court has not, therefore, understood the words, *final decree*, in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.' "

The above case is important only as recognizing to its full extent the rule laid down in the case of Forgay v. Conrad.

Inasmuch as that case seems to have been treated as a leading case upon this question, it may not be amiss to quote further from the opinion of Chief Justice Taney:

After citing Whiting v. Bank of U. S., 13 Peters, 15 and Michaud v. Girod, 4 How 503, says at p. 204: "The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be deliverd to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the Circuit Courts. * * * And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a cer-

tain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessarry for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

In Mills v. Hoag, 7 Paige 18, application was made to dismiss an appeal from a decree of the vice chancellor. Chancellor Walworth at p. 19, says: "The decree was final, and not interlocutory, as it finally disposed of the subject of litigation so far as the court was concerned. Chief Justice Savage defines a final decree to be the last decree which is necessary to be entered to give to the parties the full and entire benefit of the judgment of the court. The decree in this case comes within that definition, as no further questions or directions are reserved for the future judgment of the court. And although some further proceedings are to be had before a master to carry into effect the decree, all the consequential directions depending upon the result of those proceedings are given in the present decree. It is true there may be exceptions to the master's report, and in that case a further order of the court will be necessary to dispose of those exceptions. But a decree is not the less final in its nature because some future orders of the court may possibly become necessary to carry such final decree into effect. The usual decree in mortage cases, for the sale of the property and the distribution of the fund among the paties and finally disposing of the question of costs, is a final decree as between the complainant and the defendants, and is constantly enrolled as such; although the master's report of the sale and distribution may be excepted to if it is erroneous, and it may require a subsequent order of the court to dispose of the questions which may thus arise."

(*b.*) Counsel for appellee claim that the decree in this case finds its parallel in decrees in patent cases, and that

such decrees under the authorities cited, are not final until the master's report comes in and is confirmed by the court, although the confirmatory decree adds nothing to the interlocutory decree, except that it adjudges the amount of damages and awards execution.

It is a sufficient answer to this argument to say, that in patent cases, the plaintiff claims damages for the infringement of the patent during the period in which the patent has been infringed prior to the commencement of the suit, as well as an injunction against further infringement, so that the granting of the injunction does not dispose of the whole merits of the controversy; but there is no such case made here by the pleadings, and the final judgment must always have reference to the merits of the controversy between the parties.

This is simply an application for an injunction, after having established a right, and at most the fixing of a maximum rate of compensation for the facilities granted—these were the matters in controversy—and the court has definitely and finally passed upon them, so that they could not be brought up again, except by the institution of new proceedings.

(*c.*) At page 56 of his brief, the counsel for appellee raises this difficulty, viz:

That if the decree appealed from be a final one, and this court four years from now affirms it, and sends its mandate to the court below, and the Master has then read his report, and exceptions have within one month been filed by the parties, and the court below has passed upon them, then both parties would be remediless, because a subsequent appeal (Supervisors v. Kennicott, 94 U. S. 499), "brings up for consideration only the proceedings of the Circuit Court, after the mandate of the Supreme Court has issued." But the gentleman has evidently misread the opinion of the court in the case of Supervisors v. Kennicott; for the court simply decided in that case that whatever has been decided here upon

one appeal, cannot be re-examined in a subsequent appeal of the same suit—that is, that the court would not open the case for further hearing upon the issues already presented and decided. The court in this case did not hold that they would refuse to pass upon questions not presented on the first appeal, because they were raised between the parties before the mandate issued on the first appeal, but merely that they would not re-open questions once decided.

If in the case before the court, the report of the Master under the order of June 5th, 1882, should be excepted to, it would be in regard to matters that were not embraced and could not be embraced in the final decree of March 25th, 1882. All that the Master could report would be what in his opinion would be a fair compensation for services already performed, and whether the defendant had made and collected charges in excess of such rate of compensation, and how much the excess was, and state an account between the parties as to those matters, and nothing of the kind is embraced in the decree appealed from.

We deem it not inappropriate to call the attention of the court to the very great importance of the questions involved in this appeal, and the necessity of having a speedy determination of them by the highest court in the land. Some of the questions are comparatively new, and they arise between two classes of transportation companies, engaged very largely in the transportation of persons and property over a vast extent of territory, and in regard to which the public must necessarily have a deep interest, so far as the rights of those companies are concerned, and the obligations which they owe to each other and to the public. They have been settled adversely to the railroad company by the decree in this case, and we claim a right on the part of the appellant to be heard by the court of last resort upon the questions determined by that decree.

JAMES O. BROADHEAD,
For Appellant.

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IN THE

Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO., - - - *Appellee*,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *Appellant*.

COPIES OF PLEADINGS, MOTIONS, OPINION AND DECREES, IN U. S. CIRCUIT COURT, AGREED BY THE PARTIES TO BE PRINTED ON MOTION TO DISMISS APPEAL.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

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COPIES OF PLEADINGS, MOTIONS, OPINION AND DECREES, IN U. S. CIRCUIT COURT, AGREED TO BE PRINTED ON MOTION TO DISMISS APPEAL.

BILL OF COMPLAINT.

The Southern Express Company, a corporation created under and pursuant to the laws of the State of Georgia, brings this, its bill, against the St. Louis, Iron Mountain and Southern Railway Company, a corporation created under and pursuant to the laws of the State of Missouri, and owning and operating a railway in the district aforesaid:

And thereupon your orator complains and says:

I. Your orator, the Southern Express Company, is a corporation duly created, organized, and now existing under the laws of the State of Georgia, for the purpose, and with the powers necessary thereto, of receiving and forwarding upon railroads, steam vessels, and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practical expedition, in the special care and custody of its own employes, and at destination personally delivering packages of money or currency, gold and silver bullion, bonds, bank-notes, deeds, and other valuable papers, jewels, silks, laces, and other articles of great value, requiring for their security extraordinary care and precaution, and also parcels of goods, wares, and merchandise, requiring great dispatch or careful handling; and also fruit, vegetables, fresh meats, fish, oysters, fish spawn, and other articles liable to decay or other injury from delay: and also live animals requiring particular care and attention during transportation; and also for receiving and forwarding for collection bills, notes, drafts, and accounts, and receiving and returning payment thereof; and also for receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles, and returned to shipper; and in so doing, to afford the public, under a single contract, and on assured responsibility, safe, reliable, and speedy transportation from and to all points accessible only over two or more railroads, and generally to perform for the public all offices that by usage are incident to the class of carriers now well known, recognized, and designated by the public as "express carriers."

II. Your orator further avers that railroad companies, by reason of the limited extent of their lines and powers, and the extraordinary care and attention demanded, and the peculiar and immense hazard, and other difficulties and embarrassments incident thereto, were not only unwilling, but

unable to perform for the public this kind of transportation and service in a manner as efficient and with as responsible assurance of safety and dispatch, as the necessities and convenience of the public demand, but, by usage, have surrendered the same to be performed by express companies, organized and equipped especially therefor, and by long custom and usage, as well as in respect to their lawful right thereto, have accorded to express companies for a reasonable compensation the means and facilities upon their lines for doing this kind of transportation.

III. The express business, first organized in the United States about the year 1839 between Boston and New York, has grown to such dimensions that, extending now over all of the States of the Union and Canadas, and to Europe and the West Indies, it is carried on by over one hundred and sixty different express organizations, meeting the requirements of the public in the localities in which such business is transacted, and occupying therefor, without molestation and with the free permission of the railway companies, nearly every prominent railway line in the United States. Such express companies have, in the aggregate, as your orator is informed and believes, an investment in capital and equipment of over $30,000,000, and such amount, as your orator is also informed and believes, and therefore avers, is not incumbered by mortgage or other lien, and constitutes, at all times, a fund amply sufficient to secure the public against any probable loss of its property while in the custody of the express companies; and which security is not afforded, as your orator is informed and believes, by any railway company in the United States.

IV. All of said express companies, as your orator is informed and believes, have invested their capital and built up their business upon the express understanding with the railway companies that they would voluntarily afford all the

facilities needed by the express companies as the representatives of the public for the transaction of its business, or upon the knowledge and belief that the public, whether demanding such facilities in its individual capacity, or through the express companies as its representative, had a legal right to compel the granting thereof by those who had been created by the public and for the public. No railroad company in the United States, to the knowledge of your orator, has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company, so far as your orator is advised, has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter, and no railway company, to the knowledge of your orator has ever had the ability to assume, as between itself and the public, such obligations for the transportation of such matter as are universally assumed by the express companies toward all who treat them with frankness.

V. The principal public demand for the existence and use of an express company has been as a medium of exchange of money and the collection of negotiable securities and the transportation of express packages of greater or less value, or of packages the price or value of which was to be collected from the consignee at the time of delivery, and remitted to the consignor. The public has always demanded in the transaction of its business of this character, an undoubted financial responsibility on the part of the carrier, known integrity on the part of the employes, and the invention and application of all moral and mechanical safeguards which ingenuity and experience could devise or suggest. It has also required instrumentalities for the primary collection and subsequent delivery of express matter for the relief of the public generally in that regard. This demand has

been made with full knowledge on the part of the public of the capacity and responsibility of existing railroad, steamboat, and stage companies, and was, and always has been a demand for facilities and security, which those companies did not afford.

VI. The government of the United States, as the representative of the public, has, for the reasons aforesaid, availed itself of the facilties and security afforded by the express companies, to an extent sometimes larger and almost always equaling the demands of the general public. The laws of the United States now in force permit the use of the mails for the transportation of moneys and of many articles which are known as express matter, at what are called "third-class rates," and the railway companies of the country, unless forbidden by their charters, have also instrumentalities for the transportation of moneys and securities from point to point; but neither the government of the United States nor the public generally have ever used, to any appreciable extent, either the mail or railway facilities for the transmission of such moneys and securities. The express companies have been created by the public, as their instrumentalities for the transmission as well of public as of private moneys, as aforesaid, and the necessity for the existence of such instrumentalities is as great as the necessity for the existence of the ordinary vehicles of commercial intercourse; and in receiving, transmitting, and delivering express matter for the public, the express companies act as the agents of the public, giving that attention to the collection, transmission, and delivery thereof, which neither the public nor the railway companies can give.

VII. Before the commencement of hostilities in the late civil war, the Adams Express Company, a joint stock association, under the laws of the State of New York, was engaged in carrying on the express business in all the Southern States,

and upon all the principal railroads therein, and was then possessed of a large and valuable equipment necessary for the conduct thereof, and had created and built up for itself a valuable business therein, and had possessed and enjoyed the good will of the public in respect thereto. For controlling reasons of a public character, then generally known, the said Adams Express Company was compelled to withdraw from the said Southern territory, and it thereupon, in or about the month of July, 1861, sold and transferred to your orator, the Southern Express Company, its said equipments, business, and good will in the several Southern States, to-wit, in Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and a portion of Tennessee. And thereafter such business was, in the said several States, owned, possessed, enjoyed, and carried on by the said Southern Express Company, in the like manner as the same had been theretofore conducted by the said Adams Express Company.

VIII. For the use of the equipment and the enjoyment of the good will aforesaid, the said Southern Express Company, in the conduct of its said business, was afforded all the facilities necessary therefor, by all the principal railways in said States, over which the business of the public required the said Southern Express Company to extend its lines. And from time to time the Southern Express Company enlarged and extended its aforesaid business upon and along the lines of the several railroads thereafter built in the territory aforesaid; and for the dispatch of its business so extended, provided, at great expense, skillful and faithful servants, safes and packing chests, peculiarly suited to the safe transportation and storage of money and valuable packages; wagons, horses, and trucks, for collecting, transferring, and making delivery of express matter; and erected at various railroad stations permanent offices and warerooms; and established lines of rapid communica-

tion, and fixed and published tariffs of charges between all accessible points in said Southern States. And thence, hitherto, having conducted said busines for a period of nearly twenty years, it has, at great expense of money and energy, built up in said territory, and now owns and enjoys therein an express business of great value, and by its faithfulness to, and zeal for the interests of the public, and by the fairness and promptness with which it has performed its obligations, and by the reasonableness of the charges it has always made, it has earned and now enjoys an enviable and widely advertised reputation for responsibility and promptness, and has secured the confidence of the public, and thereby a good will and commercial standing of great and inestimable value to your orator in the business aforesaid; and all of which constitutes its property.

IX. Your orator would further show that said defendant is duly furnished and equipped with light, durable cars, especially constructed, and intended to be attached to their passenger trains, and used for the transportation of express freights, and express messengers in charge thereof, and is also equipped with all other means and facilities necessary to your orator for carrying on its express business as aforesaid.

X. Your orator further avers that heretofore, and on the third day of March, 1851, the St. Louis and Iron Mountain Railroad Company was duly incorporated under and pursuant to the laws of the State of Missouri, and thereafter owned and operated a line of railway from St. Louis in a southerly direction, extending the same, from time to time, until it reached the boundary line between the States of Arkansas and Missouri aforesaid, and which said line is now owned and operated by the said defendants under the consolidations hereinafter mentioned.

XI. And your orator further avers that the said St. Louis and Iron Mountain Railroad Company subsequently, and on the 30th day of April, 1872, entered into an agreement in writing with the said Adams Express Company, in reference to the transaction by the said express company of the express business over so much of the lines of the said railroad company as were then in operation, and which said contract was in the words and figures following, to-wit:

"Memorandum of agreement made the 30th day of April, A. D. 1872, between the St. Louis and Iron Mountain Railroad Company, of the first part, and the Adams Express Company, party of the second part, witnesseth:

The St. Louis and Iron Mountain Railroad Company agree to furnish the said Adams Express Company one-half of the baggage car on each of its passenger trains on main line and branches for carrying express freight; not to be loaded with over seven thousand pounds (7000) at any one time; and it is further understood that the express company shall have the use of part of the baggage car on accommodation trains between St. Louis and Potosie, to an extent not in excess of the amount allowed on passenger trains.

It is understood that each of said cars shall run each way daily on the passenger trains, and no charge shall be made for Sunday, so long as the only night passenger trains are used on Sunday.

It is further agreed by the St. Louis and Iron Mountain Railroad Company that it will prohibit its conductors, agents, and baggage-masters from transporting on its passenger trains, or from accepting compensation for any matter except extra baggage; and, further, the said railroad company agree they will not permit any person or company to do an express business on their passenger trains on any better terms, or for any less payment, than that given the Adams Express Company.

For and in consideration of the service herein named, the said express company agree to pay to the St. Louis and Iron Mountain Railroad Company one hundred and twenty-five dollars per day, and a proportional increase per day for every ten (10) miles of road operated by them on extension

of road for the transportation of its messengers with safes and packages, chests, and an average amount of freight not exceeding ten thousand ponnds (10,000 lbs) per day, and for all freights in excess of the above amount per day they agree to pay the said railroad company once and a half its regular first class rates for freight as per freight tariff, but not to exceed seventy-five cents per 100 lbs. for through freight from St. Louis to Columbus, Kentucky. It is further agreed, that for all extra cars said express company may require, the said express company shall pay first class freight rates for all freight carried in them.

The express company agree to carry all money and other valuables for the same railroad company to and from points on the line of its road free of charge, and for such matter as may be sent to, or received from, points off the line to charge the railroad company not exceeding two-thirds the rate charged the public.

The railroad company to be exempt and indemnified by said express company against all loss or damage to goods or money transported by said express company.

Settlements are to be made on or before the tenth day of each month for the business of the preceding month.

This contract to remain in full force one year from the 1st day of May, 1872, and thereafter until thirty days notice shall be given by either party to the other of its desire to discontinue the same.

In witness whereof the president of the St. Louis and Iron Mountain Railroad Company and the superintendent of the Adams Express Company have this day affixed their signatures.

THOS. ALLEN,
Pres. St. L. & I. M. R. R.

XII. And your orator further avers that in the year 1874 there was existing in the State of Arkansas a railway corporation duly organized under the laws of said State, and known as the Cairo and Fulton Railroad Company, and owning and operating a line of railway between Cairo and Fulton aforesaid; and also in the State of Missouri a cor-

poration known as the Cairo, Arkansas and Texas Railroad Company. On the first day of February, 1874, the said Cairo and Fulton Railroad Company and the said Cairo, Arkansas and Texas Railroad Company, entered into a contract with your orator in reference to the transaction of the express business over the lines of the said two railways, and which said contract was a continuation or modification of certain contracts theretofore existing with reference to the transaction of the express business over the lines of said railways, and which said contract of the first of February, 1874, was in the words and figures following, to-wit:

"Memorandum of agreement made this first day of February, 1874, by and between the Cairo and Fulton Railroad Company, of Arkansas, and the Cairo, Arkansas and Texas Railroad Company, of Missouri, as party of the first part, and the Southern Express Company, of Georgia, as party of the second part. Witnesseth:

The said party of the first part agrees to furnish the party of the second part one-third of the room in the baggage car on each passenger train over the Cairo and Fulton Railroad, and the Cairo, Arkansas and Texas Railroad, for the carriage of express matter not to exceed six thousand pounds per day in each car.

It is understood and agreed between the parties hereto, that no conductor, baggage-man, or other railroad agent of said companies, shall be allowed to transport on passenger trains (or receive any compensation therefor) any matter except extra baggage. That no other person or express company shall be permitted to do express business or convey matter on passenger trains, on any better terms or for less compensation than those given to, or required of the party of the second part.

It is further agreed between the parties hereto that the party of the second part will pay to the party of the first part fifty dollars per day for the transportation of its messengers, with safes and package chests, and an average amount of express matter not to succed six thousand pounds per car over the Cairo and Fulton Rrilroad, and ten dollars

per day for similar privileges and accommodation over the Cairo, Arkansas and Texas Railroad Company, it being understood that payment for service on the latter road shall commence when the express company shall place its messengers thereon. For all express matter carried in excess of 6,000 pounds on any one train, the same shall be charged twentyt-five cents per hundred pounds per hundred miles, any excess matter carried less than one hundred miles shall be charged as for one hundred miles.

It is further understood and agreed between the parties hereto that the express company is to carry all money packages and valuables for the railroad companies herein named to and from points on the line of said road free of charge. It is understood that where the parties to this agreement employ one and the same person as joint agent, the receipt of the express messenger on the train for such money packages, etc., alone shall constitute a delivery to the party of the second part, and the receipt of the party to whom such packages are addressed shall in such cases be necessary to constitute a delivery to the party of the first part.

For such express as may be sent to or received from points off the line of the roads named herein, the express company is to charge not exceeding two-thirds of the rate it would charge the public. The railroad company is to be exempt from, and the express company shall indemnify it against all loss and damage to goods or money transported by said express company.

When, by reason of accident, or other cause, the railroad companies, or either of same, are unable to provide the facilities herein agreed to be furnished each day, then no charge shall be made against the express company for such non-service.

The car room allotted to the express company is to be lighted and warmed by the railroad companies.

In cases where the agent of the railroad companies is employed by the express company as its agent, and it is practicable, the depots of the party of the first part may be used free of charge by the party of the second part, and room or space will be accorded on the right of way or premises of the railroad companies free of charge for the express company to erect offices thereon.

Settlements under this contract are to be made by the express company on or before the 10th day of each month for the business of the preceding month.

The express company will be entitled to one messenger on each train, and the officers of the express company travelling on its business will be carried free of charge. This contract to remain in force until terminated by either party giving the other sixty days notice of its intention to thus withdraw therefrom.

In witness whereof, the president of the C. & F. and the C. A. & T. R. R. Companies, and the general superintentendent of the Southern Express Company have hereunto set their hands the day and year aforesaid.

(Signed,) M. J. O'BRIEN,
For Southern Exp. Co.

(Signed,) THOS. ALLEN,
For C. & F. R. R. Co.

(Signed,) THOS. ALLEN,
For C. A. & T. R. R. Co.

XIII. Your orator further avers that the said St. Louis and Iron Mountain Railroad Company and the said Cairo and Fulton Railroad Company and the said Cairo, Arkansas and Texas Railroad Company were duly, and according to law, consolidated on the 16th day of May, 1874, under and by the name of St. Louis, Iron Mountain and Southern Railway Company, the defendant herein, and thereafter conducted and are now conducting and operating a line of railway between the cities of St. Louis and Cairo aforesaid, and Fulton aforesaid, and Texarkana, on the boundary line between the States of Texas and Arkansas aforesaid.

XIV. Your orator further avers that the said Adams Express Company and the said Southern Express Company continued, after the said consolidation, severally to enjoy all the rights, privileges, and facilities granted by the two contracts aforesaid, and until on or about the first day of April, 1878, when the said Adams Express Company, with

the assent and permission of the said defendant, relinguished to the said Southern Express Company the transaction of the express business over so much of the lines of the said defendant as had been embraced in its contract of the 30th of April, 1872, with the Adams Express Company, hereinbefore set forth, and thereafter the entire express business over the lines of the said defendant's railway has been and is now daily conducted by the said Southern Express Company.

XV. Your orator further avers, that for the transportation of its express matter over the lines of the defendant and of its predecessors, the Southern Express Company has paid the sum of $505,761.89, a large portion of which was paid to said railway company for the transportation of express matter not local to the defendant's line, but going to or coming from points beyond the termini of defendant's railroad, and mostly to or from other States of the Union. And your orator avers, upon information and belief, that the said Adams Express Company, during the existence of its relations with the said defendant, paid to it a proportionate amount for similar express service.

XVI. Relying upon the duty and obligations impossd upon said railway company by law, and the conditions of its enjoyments of its franchises, as well as by the contract aforesaid, to afford to your orator for a reasonable compensation equal and indiscriminate opportunities and facilities of transportation of the kind, and to be enjoyed in the manner demanded by the convenience and necessities of the public, and established by the usage and custom of said railroad company, and all other railroad companies in like cases, your orator made large investments of money in building up its business at said stations and along and upon said railroad, and in establishing other and connecting routes for business to be transported beyond the lines of said rail-

road, and in advertising the same to the public; and by such investment, and its energies expended through a long time, to secure to the public the facilities of safe and rapid dispatch to any and all places, and to itself the confidence and patronage of the public, it has built up, and now owns and enjoys, an express business and prestige and good will thereto, upon said line, of great value to your orator, by reason of the tolls and profits thereby accruing to your orator.

XVII. Being thus organized and established in the said Southern States, after the close of the war, the Southern Express Company entered into an arrangement now in force with the Adams Express Company, for the general regulation of the transportation of property daily coming from the territory of the one, into the territory of the other, and by which property received by the Adams Express Company, destined for points within the territory of the Southern, and property received within the territory of the Southern destined to points within the territory of the Adams Express Company, or reached by its connections, is daily interchanged at certain specified points and upon a basis of charge proportioned to the distance traversed in the territory of either. In case of such interchange of express matter within such teritory, the express company originally receiving the same remains liable to the public for the value thereof until delivered to the consignee.

XVIII. Since the said understanding and arrangement, the Southern Express Company has made such interchanges with the said Adams Express Company, and now makes the same daily at Richmond, Lynchburg, and Norfolk, Virginia; Chattanooga, Tennessee; Cairo, Illinois; Paducah, Kentucky; and St. Louis, Missouri; and has not, itself, since then, either delivered or received express matter north of such points, but the territory south thereof has been operated by the said Southern Express Company alone. By this

arrangement, the said express companies have been enabled to extend to the public the advantages and facilities of a continuous and most speedy line of transportation for express matter through the several States in which the said companies carry on their business, and, by the aid of other responsible express companies, throughout the entire United States, under a single bill of lading, assuring the safe delivery of such express matter over all the connecting lines upon which it is carried to its destination.

XIX. The said Southern Express Company now owns and controls an express business properly and most expeditiously to be conducted over the said defendant's railway, sufficient to guarantee to the said defendant tolls or earnings in the future as great or greater than those heretofore paid it as aforesaid, to the like pecuniary benefit of the defendant, as it has heretofore received.

XX. Your orator further avers, that according to the usage and business of express companies, your orator has provided wagons and horses, drivers, iron safes, and other conveniences with which it collects and delivers on the trains of defendant, express matter, using its own means, agencies and appliances alone about the same, until the same is actually delivered on the defendant's trains; and likewise using solely its own means and agencies in transporting and delivering such freights after they leave defendant's trains.

XXI. And your orator further avers, that it frequently has occasion to forward over defendant's line large sums of money, for which the defendant, having its property heavily mortgaged to secure existing debts, affords no adequate or prompt security or indemnity in case of loss; and so the safety of your orator and the defendant, as well as their convenience, has demanded, and the defendant, according to the usage of railroad traffic in such cases, has accorded

the means and facilities to your orator of forwarding such sums of money in the special care and custody of your orator's own agents; and otherwise your orator would be practically denied the opportunities of safe transportation of said sums of money over defendant's line, intended by the creation of the defendant as a common carrier for the public, to be afforded to the public. The defendant's railway is mortgaged, as your orator is informed and believes, to the extent of over $30,000,000.

XXII. Your orator further avers that its interest, and the preservation of its valuable property and good will, demands that it shall continue to have and enjoy the daily means and facilities aforesaid heretofore by the defendant accorded as aforesaid; and for the use and enjoyment thereof, your orator is always ready, and hereby offers to pay such just and reasonable compensation, and to conform to such just and reasonable rules and regulations as may be lawfully required and imposed by the defendant. Your orator is advised and believes, and therefore charges, that by reason of the premises hereinbefore recited, and by force of the general statutes of the State of Missouri in such case made and provided, and to which reference is hereby had, the duty is now imposed upon the defendant to always afford to your orator, as one of the public, the means and facilities upon its railway, of forwarding and transporting, in the manner established as aforesaid by the usage of the express business, upon reasonable terms and under reasonable regulations, its express matter and messengers.

XXIII. And your orator further avers, upon information and belief, that, within a short time, certain persons have sought and obtained from the legislature, or under the authority of the laws of the State of Arkansas, a charter, or other incorporating act, for a new express company, called "The Mississippi Valley Express Company," and have per-

fected the organization of an express company thereunder; and that such organization was suggested and promoted by parties interested in the said defendant's company, and for the purpose of favoring the same on the lines of the said defendant's railway, and to the exclusion therefrom of the said Southern Express Company, and to the total destruction of its business thereon, and of its property therein.

XXIV. And your orator further avers that the first information which it had of the formation of said new company, and of the intent of the promoters thereof to destroy the business of said Southern Express Company, was contained in a letter sent by the said defendant to the said Southern Express Company, in the words and figures following, to-wit:

"ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY.

GENERAL SUPERINTENDENT'S OFFICE,
ST. LOUIS, *March* 26, 1880.

M. J. O'BRIEN, ESQ., *General Superintendent Southern Express Company, Memphis, Tenn.:*

DEAR SIR:—This company has come to the conclusion that it is to its interest to terminate the contract made with you on February 1, 1874, and have directed me to give you the notice contemplated in said contract, which will terminate the same sixty days from this date. Other arrangements have been made, and, if desirable to you, can turn it over at an earlier date.

Personally, I regret to sever the pleasant relations existing for many years with yourself and officers, and hope for a continuance of the same between yourselves and your successors.

Very truly,
A. W. SOPER,
General Superintendent."

XXV. Your orator caused the said letter to be answered in the words and figures, following, to-wit:

"SOUTHERN EXPRESS COMPANY (EXPRESS FORWARDERS).

OFFICE OF THE GENERAL SUPERINTENDENT,
SAVANNAH, *April* 1, 1880.

A. W. SOPER, *General Superintendent St. Louis, Iron Mountain and Southern R. R., St. Louis, Mo.:*

DEAR SIR:—Yours of the 26th ultimo, directed to Memphis, Tennessee, reached me here this morning, and I must confess that, in view of the pleasant business relations which have existed between our respective companies for several years, I am surprised at the notice proposing to terminate the same.

I will thank you to inform me what other arrangements have been made which, in the judgment of your company, rendered dissolution with ours necessary, and would also ask whether the same terms and privileges which may be accorded to others can not be extended to this company, so as to permit the continuation of its business on your lines.

I expect to be in Nashville on or about the 5th instant, and will be gratified to have your reply directed to that point.

Reciprocating the personal regard which you are pleased to express,

I am, respectfully,
M. J. O'BRIEN,
General Superintendent."

XXVI. Your orator further avers that it received a telegraphic reply to its said letter, in the words and figures following, to-wit:

ST. LOUIS, *April* 5, 1880.

M. J. O'BRIEN, *General Superintendent Southern Express Company:*

Your letter just received. The contract has been made with other parties, exclusive, same as your own was.

A. W. SOPER."

XXVII. And your orator further avers, upon information and belief, and therefore charges that, by the "other parties" referred to in said correspondence, the said defendant referred to the said Mississippi Valley Express

Company, and that the said defendant heretofore made a contract with the said Mississippi Valley Express Company in writing, whereby it agreed to give to the said Mississippi Valley Express Company, for a definite period, an exclusive right to have, enjoy, and possess all the means, facilities, and accommodations necessary for the transacting of express business, and for the transportation of express matter over the railway lines of the said defendant, and therein covenanted and agreed not to grant over its railway to the public, generally, or to any person, firms, or corporation, other than the said Mississippi Valley Express Company, for said period, any facilities, upon equal or any terms, for the transaction of such business on its lines; and that the defendant intended, and until as hereinafter stated, in accordance with said agreement and covenant, to exclude and eject the Southern Express Company, its messengers and business, from the lines of said railway, on the 25th day of May, instant, and thereafter to deny and refuse to the Southern Express Company the means and facilities of doing said busines.

XXVIII. And your orator further avers, that in order to obviate the necessity for any litigation in the premises, and to secure by amicable means a proper recognition of the rights of the said Southern Express Company, your orator, on the 13th of April, 1880, caused to be addressed and sent to the said defendant a letter In the words and figures following, to-wit:

"ST. LOUIS, April 13, 1880.

HON. THOMAS ALLEN, *President St. Louis, Iron Mountain and Southern Railway Company, St. Louis, Mo.*

DEAR SIR:—I received, under date of March 26th ultimo, a letter, (which was promptly acknowledged) from Mr. A. W. Soper, General Superintendent, referring to the contract existing between this company and yours, and saying that he had been directed to give us notice that the same would

terminate sixty (60) days from the date of his communication, alleging as a reason therefor that "other arrangements had been made."

Recalling the circumstances attending the origin of relations between our respective companies, you will remember that for two or more years previous thereto the express business was conducted by the Iron Mountain Railroad Company on its own account, and then (doubtless for good and sufficient reasons) the privilege was accorded to our company under an arrangement effected by you and myself.

This agreement obligated us to purchase the express property then owned by your Company which we did. It also stipulated the terms upon which we were permitted to conduct the business, and further that no other person or company would be permitted to do an express business on your road on any better terms, or for any less payment, than that given us. We continued under same for several years, during which time the revenues therefrom were insufficient to pay the expenses of operating the line; but, stimulated by the prospective growth of the country through which it passed, and the proposed extension of your road, we persevered, and by diligent effort, succeeded in inducing to your route a class of through business which it had not previously enjoyed; and, furthermore, we assisted in every possible way to encourage and promote the traffic in various products of the region along the route of the Iron Mountain Road; and it is only of late that we have had any encouragement to hope for compensation for our outlay and efforts, involving considerable time, labor, and expenditure of money.

In the opinion of officers of your own, as well as those of railroads in Texas, it was thought that a separate agency of this company should be established in St. Louis, as it might be the means of securing business between this point and Texas, which was, at the time, supposed to be seeking other channels. Our company at once yielded to this wish, and has since maintained an office here, at considerable expense, for the representation and interest of your line.

It is believed that the service we have rendered the public has always proved entirely satisfactory, and, so far as

known, no complaint has ever emanated from yourself or other officers of your road as to the conduct of the same.

In view of all these circumstances I am surprised at this notice proposing to terminate our business relations, and in bringing the matter to the attention of yourself and Board of Directors, officially, it is with the hope that no other arrangements will be consummated which will exclude our company from your line and, therefore, have to ask your favorable consideration of this, our application, for a continuation of present, or such other facilities as may be in your power to accord, and upon terms and conditions you may see fit to grant any other persons.

Asking an early response,

I am, respectfully,

M. J. O'BRIEN,
General Superintendent.

XXIX. And your orator further avers, that in furtherance of the purpose to give the said Mississippi Valley Express Company the exclusive enjoyment of the privileges aforesaid, and to terminate all the rights of your orator under the other contract hereinbefore set forth in reference thereto, the said defendant, on the 23d day of April, 1880, sent to the said Adams Express Company a letter in the words and figures following, to-wit:

"ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY.

GENERAL SUPERINTENDENT'S OFFICE,
ST. LOUIS, *April* 23, 1880.

J. H. RHODES, ESQ., *Sup't Adams Express Co., Cincinnati, O.:*

DEAR SIR:—This company has decided that it is to its interest to terminate the contract made with you April 30, 1872, and has directed me to give you the notice contemplated in said contract, which will terminate the same thirty days from April 26th.

Yours truly,

(Signed,) A. W. SOPER, *Gen. Sup't.*"

XXX. And your orator further avers that on the 30th day of April, 1880, it received from the said defendant a further communication in the words and figures following, to-wit:

"ST. LOUIS, *April* 30, 1880.

M. J. O'BRIEN, ESQ., *Gen. Sup't Southern Express Co.:*

DEAR SIR:—In giving you notice I named sixty days from March 26th.

Mr. Allen desires me to write you, asking if you will be ready to turn over the line to the new company sooner than May 26th.

Yours truly,
A. W. SOPER, *Gen. Sup't.*"

To which, on the 3rd day of May, it returned an answer in the words and figures following, to-wit:

"MEMPHIS, *May* 3, 1880.

A. W. SOPER, ESQ., *General Superintendent St. Louis, Iron Mountain and Southern Railway, St. Louis, Mo.:*

DEAR SIR:—I am this morning in receipt of your favor of the 30th ultimo, referring to your notice terminating, on May 26th, the business arrangement existing between our respective companies, and, further, asking if this company "will be ready to turn over the line to the new company sooner than May 26th."

Responding to your inquiry will suggest, that our continuation on the road ought not to hinder or interfere with the proposed operations of any other similar organization to whom it may be the pleasure of your company to accord equal privileges.

Respectfuily,
W. J. O'BRIEN,
General Superintendent."

And that on or about the 5th of May, instant, it received an answer to its said letter of the 13th of April, above set forth, in the words and figures following, to-wit:

"ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.

PRESIDENT'S OFFICE,
ST. LOUIS, *May* 4, 1880.

W. J. O'BRIEN, ESQ., *Superintendent Southern Express Company:*

DEAR SIR:—I have considered the contents of your letter of April 13th.

Having made arrangements with another express company, which we consider more desirable and advantageous to us than that which has existed heretofore with the Southern Express Company, we have not been able to find any sufficient reason for recalling the notice given you by our superintendent on the 26th of March. If the proposals in your letter had been received earlier, possibly the result might have been different; but, as it is, it is too late. We expect the new company to come upon our road about the 26th instant, or as soon as the necessary arrangements can be made.

Yours, very truly,
THOS. ALLEN,
President."

To which said letter your orator, on the 7th of May, instant, sent a reply, in the words and figures following:

MEMPHIS, *May* 7, 1880.

THOS. ALLEN, ESQ., *President St. Louis, Iron Mountain and Southern Railway Company, St. Louis, Mo.:*

DEAR SIR:—I am in receipt of your favor of the 4th instant. It states that "if the proposals in your letter had been made earlier, possibly the result might have been different; but as it is, it is too late."

My communication, to which you make reference, concluded with the request that your company would be pleased to extend to the Southern Express Company facilities for the continuation of its business, over your lines, upon such terms as you might see fit to accord to any similar organization.

Construing that portion of your favor just quoted to mean that if we had previously proposed terms, etc., I will state that at my instance our Mr. H. C. Fisher, superintendent, visited St. Louis, January 28th last, for the purpose of conferring with you in regard to a new contract. He was informed by your Mr. Soper that you were too ill to talk business, and Mr. Fisher then proposed certain terms as a basis for a new contract, which were assented to by Mr. Soper as fair, reasonable, and all that his company could expect, and he promised to urge your acceptance of same. At the same time Mr. Fisher suggested that if the rates and conditions named should not be entertained, he would be pleased to have a proposition from your company.

Still indulging the hope that our business relations may continue undisturbed, and prove of mutual interest,

I am, respectfully,

W. J. O'Brien, *Gen'l Supt.*

XXXI. Your orator further avers that on or about the 9th of May instant, it received from the said defendant a further letter, in the words and figures following:

St. Louis, May 8, 1880.

M. J. O'Brien, Esq., *General Supt. So. Ex. Co.*

Dear Sir:—I am in receipt of your letter of May 3d, and have referred it to Mr. Allen. We are somewhat surprised at your intimation that your continuation on the road should not hinder or interfere with the proposed operations of the new company. We are reminded of the uninterrupted and exclusive privilege you have enjoyed upon this line for the ten years past, and now that it is decided to change, you can not but see the importance of allowing the new people like privileges. Mr. Allen is determined in this matter—is personally interested with his friends—and I believe you can not but decide with me, the better policy would be to retire in harmony, and retain the friendly relations which have so far existed between the officers of the two companies. I shall be pleased to learn your decision in the matter.

Yours, respectfully,

A. W. Soper.

XXXII. And your orator further avers that on or about the 12th of May instant, it received from the said defendant a letter, in the words and figures following, to-wit:

ST. LOUIS, May 11, 1880.

M. J. O'BRIEN, *General Sup't. Southern Express Company:*

DEAR SIR:— In your reply to your letter of the seventh, I have to say that under the contract we have made it will be impracticable to have the Southern Express Company continue to do business on our line, as an express company, in our passenger trains after the twenty-sixth instant. You will therefore please arrange your affairs so that the new company may take up the business without interruption from and after that date, when our contract with the Southern Express will have terminated.

Very respectfully yours,

THOS. ALLEN,

Prest St. L. I. M. & S. R. R.

XXXIII. And your orator further avers, as it has hereinbefore averred, that it was the intention of the said defendant, on and after the said 25th day of May, instant, to exclude it from participating, in behalf of the public whom it represents, in the conduct of the express business over the lines of the said defendant's railway; and that it retained the said intention, until on or about the 15th day of May instant, when it suddenly changed the same, as hereinafter more particularly stated.

XXXIV. And your orator further avers that heretofore your orator was engaged in the transaction of its express business over the railway in the State of Alabama, known as the Mobile and Montgomery Railway Company, and in the State of Tennessee, over the railway known as the Nashville, Chattanooga and St. Louis Railway, and that the said Adams Express Company was in like manner engaged

in the State of Kentucky, on the line of the Louisville, Cincinnati and Lexington Railway Company, and in the State of Indiana over the line of Railway known as the Louisville, New Albany and Chicago Railway.

XXXV. And your orator further avers that in or about the month of July, 1879, the Louisville and Nashville Railway Company, of the State of Kentucky, revived an act passed by the legislature of that State, on or about the 3d day of June, 1865, entitled "an act to incorporate the Union Express Company," and caused to be organized thereunder a corporation known as the Union Express Company, and thereafter gave or caused to be given to your orator, and to the said Adams Express Company, and by and on behalf of each of the four railway companies in the preceding paragraph mentioned, a notice in substance, to the effect that your orator and the said Adams Express Company must, on or before a given day, and either on the 20th of April or the 10th of May instant, withdraw its business and messengers from the said railway lines of the said four companies, because and for the reason by each of said four companies then severally assigned in writing, that it had made an exclusive contract with the said Union Express Company for the future transaction of the express business over its line, and that thereafter the previous facilities and accommodations afforded to your orator and the said Adams Express Company, would be withdrawn.

XXXVI. Your orator further avers that your orator and the said Adams Express Company were severally advised that neither of the said four railway companies could lawfully make an exclusive contract of the nature aforesaid with the said Union Express Company, or lawfully eject your orator or the said Adams Express Company from the lines of the said railways, and that, in order to maintain and protect the rights of your orator and the said Adams

Express Company in the premises, your orator commenced suit in the Circuit Court of the United States for the District of Alabama against the said Mobile and Montgomery Railway Company, and a like suit in the same court for the Middle District of Tennessee against the said Nashville, Chattanooga and St. Louis Railway Company; and the said Adams Express Company commenced a like suit in the same court for the District of Kentucky against the Louisville, Cincinnati and Lexington Railway Company, and also a like suit in the same court for the District of Indiana against the Louisville, New Albany and Chicago Railway Company; and that the plaintiffs in each of said suits severally procured therein, *ex parte*, an order restraining each of the said four railway companies from interfering in any manner with the express business of your orator, or of the said Adams Express Company, and each of which said orders was procured and served before the said tenth day of May, instant, and before the day on which the said two express companies had been notified to withdraw from the lines of the said railways, and a copy of which said order, as granted in the suit against the said Louisville, New Albany and Chicago Railway Company, is hereto annexed, marked "Schedule A."

XXXVII. And your orator further avers that the fact that a restraining order had been so as aforesaid granted, became and was publicly known, and subsequently became and was known to the defendant.

XXXVIII. And your orator further avers, as it is informed and believes, that on the return day of the order, so as aforesaid, issued against the said Louisville, Cincinnati and Lexington Railway Company, an application was made to the court on behalf of the defendant therein, for a postponement of the argument thereof, and that a discussion was then and there had, in the course of which it was

announced by the court that, in its opinion, the contention of the plaintiff in the said suit was well founded; that it was entitled to the relief which it prayed, and that the said court had jurisdiction to award the same, and thereupon said postponement was granted.

XXXIX. Your orator further avers, upon information and belief, that the substance of the opinion so expressed by the said court, was communicated to the said defendant, and that, thereupon, the said defendant met in conference at Louisville, the representatives of the said Louisville and Nashville Railway Company, and of the said four other railway companies, and then and there confederated together for the purpose of destroying, so far as they could, the express business of your orator, and of the said Adams Express Company, and for that purpose did agree that they would severally terminate their alleged exclusive contracts with the said Mississippi Valley and the said Union Express Companies, and would themselves thereafter effect the desired result by assuming an exclusive right to conduct the express business over their several lines of railway, and would not thereafter accord to either your orator or to the said Adams Express Company the facilities and accommodations theretofore granted to them severally, but would exclude therefrom, and would refuse to transmit the express matter of the said two companies, except upon condition of their surrendering the custody thereof, and of paying such express rates or charges as the said railway companies might severally see fit to adopt.

XL. And your orator further avers, as it is informed and believes, that on the 17th day of May, inst., the said restraining order against the said Louisville, New Albany and Chicago Railway Company came on for hearing, at Indianapolis, before the Honorable Associate Justice Harlan, of the Supreme Court of the United States, and that, there-

upon, the defendant railway company, in pursuance of the said combination and agreement, advised the said Court that it had canceled the said contract with the said Union Express Company, and that it proposed thereafter to conduct its own express business over its said line of railway, and to thereafter exclude the said Adams Express Company therefrom; and thereupon the said Court made an order in the premises, of which a copy is hereto annexed, marked "Schedule B."

XLI. And your orator further avers that the said defendant, in pursuance of the combination and agreement aforesaid, adandoned its alliance with the said Mississippi Valley Express Company, and thereafter, and on the 15th day of May instant, gave to your orator, and also, in substance, to the said Adams Express Company, a notice in the words and figures following, to-wit:

"ST. LOUIS, MO., *May* 15, 1880.

H. C. FISHER, ESQ., *Div. Supt. Southern Express Co.:*

SIR:—As by notice heretofore given you, the contract made with the Southern Express Company, under date of February 1, 1874, will terminate on the 26th inst. The St. Louis, Iron Mountain and Southern Railway Company has determined to transport all express matter, and transact all express business on its own account, and through and by its own offices and agents, on and after the first day of June next, in its own cars and on and over its own roads.

We shall be glad to receive, transport, and deliver any express matter you and your company may think proper to intrust to us.

Very truly,
THOS. ALLEN,
President."

XLII. And your orator further avers, as it is informed and believes, that it is the intention of the said defendant, on the first day of June next, to exclude your orator, its express safes and messengers, from its said railway lines,

and to refuse to accord to your orator thereafter any facilities or accommodations therefor, such as it has heretofore, and for years past daily accorded, and that such exclusion will take place unless restrained by the order of the Court, and that, if the same so take place, the express business of your orator over the lines of the said defendant's railway will not only be irreparably injured, but will absolutely be destroyed; that its customers and patrons will be lost to it; that its good will, property, and investment will be rendered worthless; that its ability to keep its contracts with other railway and express companies will be terminated, and that its usefulness to the public, as its servant, would be destroyed.

XLIII. And your orator further avers, as it is informed and believes, that the defendant has no legal right to exclude your orator from its railway lines, but that it is its legal duty to continue to afford to your orator, upon its passenger trains and at its depots and stations, the same facilities which it has heretofore accorded, or which it may hereafter afford to itself; and that, under the laws of the State of Missouri, the said defendant has no lawful power to arrogate to itself the exclusive right of conducting the express business over its said lines of railway, or to exclude other express companies from participating therein, or to charge such other express companies such express rates as the defendant may see fit to adopt; that, by said laws, the said defendant, and every railroad corporation in said State, is required to give public notice of the regular time of starting and running its cars, and to furnish sufficient accommodations for the transportation of all such passengers, baggage, mails, and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, and also to stop all trains carrying passengers, at the junction or intersection of other railroads a sufficient length of time to allow the transfer of passen-

gers, personal baggage, mails, and express freight from the trains of railroads so connecting or intersecting, and are compellable to receive all passengers and express freight from such connecting or intersecting roads, whenever the same shall be delivered to them, and to take, transport, and deliver the same, without unnecessary delay, and for such charges, and without any discrimination, whether they transport such freight in their own name or in the name of another, and for such toll or compensation therefor as is specifically provided by law, or by the railroad commissioners appointed by law, and annually to transmit to said commissioners a report, under oath, showing, among other things, what express companies run on their roads, and on what terms and conditions, and the kind of business done by them.

XLIV. And your orator further avers that it is now daily engaged in the transaction of its express business over the lines of the Memphis and Little Rock R. R., the Hot Springs R. R., and the Little Rock and Fort Smith R. R., and which are connecting or intersecting railroads with the said defendant's railway, and over all of which your orator has been constantly in the habit of transporting express matter designed for points on the line of the said defendant's railway.

XLV. And your orator further avers that the said railroad companies have classified railway freight according to law, and that the rates of toll or compensation therefor have been provided by law, and that the same can not be lawfully exceeded by the said defendant in its charges to your orator, or to the public whom your orator represents.

XLVI. And your orator further avers, as it has hereinbefore averred, that it is now in the daily custom of making

with its own horses and wagons, which it now possesses, and under drivers, for whose fidelity it is responsible, all the collections and deliveries of express freight as between the public and the railway lines of the said defendant, which the public can not conveniently make on its own behalf, and that it does not require from the said defendant any similar service, nor, as it is advised and believes, can the said defendant lawfully charge it therefor.

XLVII. And your orator further avers that, in order to ascertain what interpretation said defendant intended to place on its communication to your orator of the 15th of May, as aforesaid, upon the words, "we shall be glad to receive, transport and deliver any express matter you and your company may think proper to intrust to us," your orator, on or about the 19th day of May instant, inquired of the said defendant what rates of toll or compensation the said defendant intended to charge your orator for the future conduct of its business, and that your orator was informed by the said defendant that the said defendant would not convey on the trains conveying passengers, baggage and mails, the express matter of your orator, either at the published tariff rates of the said defendant, or at the rates prescribed by said railroad commissioners, and that the defendant's tariff of express rates had not yet been fixed, and that before the same would be furnished to your orator, said defendant desired to know what your orator intended to do in reference to the future conduct of its business over the said defendant's railway.

XLVIII. And your orator further avers, as it is advised and believes, and therefore charges, that it is lawfully entitled to demand and to receive from the said defendant, the same facilities and accommodations for transacting the express business over the lines of the said defendant's railway as may be accorded by the said defendant to itself; and that it will be entitled to have all its express matter

transported over the lines of the said defendant railway at the rates of freight or toll specifically provided by law and by the charter of the said defendant, and by the said railroad commissioners, and upon the same trains, and with like accommodation thereon, and at depots and stations, as the said defendant may accord to itself in the transportation of such express matter as it may carry; and that, in any event if the said defendant shall, during the pendency of this suit, or hereafter, undertake to do and do its own express business, the said defendant can be legally required to deduct, from the charges to be made by it to the public for the transportation of express matter, upon all express matter transported by it for the said Southern Express Company, a just and reasonable compensation for the accessorial service rendered by the said Southern Express Company, beyond and off the lines of railway of the said defendant, in the collection of goods from shippers or consignors, and the delivery of goods to consignees, by means of horses and wagons, and which accessorial service the said Southern Express Company does not require or need at the hands of the said defendant, but is now performing and rendering for itself, as is hereinbefore set forth.

XLIX. This plaintiff further, in the event that the said defendant, during the pendency of this suit, undertakes to conduct, and does conduct, for itself, the express business over its said lines of railway, hereby offers to comply with all the proper rules and regulations of the said defendant in reference to the conduct of said business, and is willing and ready, and hereby offers to pay all the reasonable freight or tolls which the said defendant railway company may lawfully demand for the transportation of express matter, as aforesaid.

L. Your orator further says, that the said Southern Express Company is now in the possession of the good will

of its customers, and is daily occupied in the conduct of its business over the lines of the said defendant's railway, and that it will be greatly injurious to the business of the said Southern Express Company if said company shall be ejected or excluded from the lines of the defendant's railway, even in the event of the said defendant's undertaking hereafter to conduct its own express business, and that there is no legal or practical necessity for any exclusion of the said express company from the lines of railway of the said defendant, the said express company being willing, as aforesaid, to conform to all proper rules and regulations of the said defendant, and offering to pay, as it hereby does, all the reasonable freights or tolls which the said defendant railway company may lawfully demand under its charter for services to be rendered to the said company in the transportation of its express matter, as aforesaid.

LI. And your orator further avers, as it has hereinbefore averred, that it has now the same and as great need and necessity, as the representative of the public, as it ever had, for the daily use and enjoyment of express privileges and accommodations over the defendant's said railway lines, and that successive actions at law, to be brought upon dally tenders of express matter to the said defendant, and its daily refusals to transport the same, would involve your orator in a multiplicity of litigations, which it has not the ability to institute or prosecute on every occasion and in every county when and where such tenders and refusals should take place; and that such litigations would be valueless in point of recovery to the said Southern Express Company, and would not protect its right on behalf of the public to have its express matter carried on lawful terms; and that such exclusion and ejectment, if it is permitted to take place, will not present the case of a single and temporary disturbance of the business of the Southern Express Company, but from its very nature will constitute a permanent,

perpetual, and irreparable injury thereto, and the entire loss within the localities designated of its good will, business, reputation, and property therein, and would, within the same localities, permanently prevent it from accomplishing for the public the specific objects for which the said Southern Express Company was organized and perfected; and that the said Southern Express Company is remediless in the premises at and by the course of the common law, and that the common law does not and can not afford so adequate and perfect a remedy herein as it is within the jurisdiction and province of a court of equity to afford.

LII. And your orator further says, as it is advised and believes, that the said defendant is a public corporation and a common carrier under the charter and laws aforesaid, and exercises thereunder a public office for the public good, and that as such it is amenable to the jurisdiction of a court of equity, and that such courts are always open and ready to exercise their powers for the purpose of compelling such corporations and common carriers to keep within the limits which the legislature has thought proper to prescribe for the exercise of their powers, and not to exercise powers beyond those which their acts of incorporation confer; and to proceed by injunction to prevent illegal injury or destruction to the rights or property of others, and to prevent illegal exclusion from the enjoyment of public rights; and to protect all such rights in their fullest extent against all and every injury thereto; and that this court has power to protect the said Southern Express Company in the premises, and to compel the said defendant to accord to your orator all its legal rights in this behalf.

Wherefore, your orator prays—

1. That during the pendency of this suit the said defendant, its officers, agents, servants and employes, may be restrained and enjoined by a proper preliminary or provisional

order or injunction, and until the further order of the court, from interfering in any manner with, or disturbing in any manner the enjoyment by the Southern Express Company of the facilities now accorded to it by the said defendant, upon its lines of railway for the transaction of the business of the said Southern Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Southern Express Company; and from excluding or ejecting any of its express matter or messengers from the depots, cars, and lines of the said defendant, as the same have been heretofore, and are now, enjoyed and occupied by the said Southern Express Company; and from refusing to receive and transport, in like manner as the said defendant is now doing, over its lines of railway, the express matter and messengers of the said Southern Express Company; and from interfering with or disturbing the business of the said Southern Express Company, or its present relations, in reference thereto, with the said defendant, in any way or manner whatsoever, and, so long as the said Southern Express Company shall be willing and ready, and offer to pay, according to all legal rates therefor.

2. That, if any dispute or disagreement shall arise between the parties hereto, during the pendency of this suit, and before a final decree herein, upon the question of what is a lawful or reasonable compensation to be paid by your orator to the defendant for the transportation of express matter, your orator may be permitted to bring the same by way of interlocutory application to this court for its decision, and that, pending the inquiry thereon, the preliminary injunction heretofore prayed, may be continued to the same purport, tenor, and effect as if the prayer for the same were here repeated.

3. That the said defendant may be decreed by this court to transport, at all times, the express matter, safes and

messengers of the said Southern Express Company, by the same trains, and with the same accommodations thereon, and in its depots and stations, as it may transport its own express matter, or as it may accord to itself; and that the said defendant may be decreed so to transport the said express matter, safes and messengers of the said Southern Express Company, at and for the statutory tolls and compensation in that behalf by law provided; and that the said defendant may be decreed to make a reasonable rebate or reduction, to be fixed and determined by this honorable court, from its charges to the said Southern Express Company, by reason of its performance of said accessorial service, as above specified, so long as the said Southern Express Company shall offer to conform to all the reasonable rules and regulations of the said defendant, and to pay all lawful charges for the transaction of its said business.

4. That a permanent injunction may issue herein to the same purport and effect as is hereinbefore prayed in regard to said provisional or preliminary injunction.

5. That your orator may have such other relief or such further or different relief herein, with its costs, as to the court may seem meet.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may, under its corporate seal and according to the best and utmost of its knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and it were specially interrogated thereunto severally, may it please your Honors to grant unto your orator a writ of *subpœna ad respondendum*, issuing out of and under the seal of this honorable court, to be directed to the said defendant, the St.

Louis, Iron Mountain and Southern Railway Company, commanding it on a certain day and under certain penalty, to be therein inserted, to appear before your Honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform and abide by, such further order or decree herein as to your Honors shall seem meet; and, also, a writ of provisional and a writ of perpetual injunction to the same tenor, purport, and effect, as is hereinbefore, set forth and prayed.

And your orator will ever pray, etc.

THE SOUTHERN EXPRESS COMPANY.

S. M. BRECKINRIDGE,
C. A. SEWARD,
F. E. WHITFIELD,
Of Counsel and Solicitors for Plaintiff.

FIRST RESTRAINING ORDER.

A temporary restraining order was granted on the filing of the bill on the 21st day of May, 1880, returnable on the 1st day of June, 1880, on which day, as appears by said transcript, the following order was made:

"The motion of the complainant for a preliminary injunction herein, according to the prayer of the bill, having been brought on to be heard, and the parties being present by their counsel, and the court having duly considered the questions presented, after argument for the defendant as well as for the plaintiff, doth hereby order that the defendant, its officers, agents, servants and employees, be enjoined

and restrained, until the final determination of this cause, from preventing the plaintiff's enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself, on payment by the plaintiff of reasonable compensation therefor."

ANSWER OF THE DEFENDANT TO COMPLAINANT'S BILL OF COMPLAINT.

1. This defendant now and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says: it does not know and can not set forth as to its belief or otherwise whether the said Southern Express Company is a corporation, duly created, organized and now existing under the laws of the State of Georgia, for the purpose of doing a general express business, or the business of express carriers, and with the powers enumerated in the first paragraph of complainant's bill.

2. Defendant denies, as charged in second paragraph of complainant's bill, that railroad companies, by reason of the limited extent of their lines and powers and the extraordinary care and attention demanded, and the peculiar and immense hazard, were unwilling to perform for the public the kind of transportation and service known as express business, in a manner as efficient and with as responsible assurances of safety and dispatch as the necessities and conveniences of the public demand, and denies that by usage said railroad companies have surrendered the said business to be performed by express companies, and by long usage and custom, as well as in respect to their lawful right thereto, have accorded to express companies for a reasonable compensa-

tion the means and facilities upon their lines for doing this kind of transportation.

3. Defendant, as to the statements contained in the third paragraph of complainant's bill of complaint, says it does not know and can not set forth as to its belief or otherwise whether the amount of investment in capital and equipment of the express companies in the United States is over $30,000,000, and whether the said amount is not incumbered by mortgage or other lien, and constitutes at all times a fund sufficient to secure the public against any probable loss of its property while in the custody of said express companies.

Defendant denies that security as ample and complete as that furnished by the said express companies is not or can not be afforded by any railroad company in the United States.

4. Defendant, as to the statements contained in paragraph four of complainant's bill, denies that said express companies have invested their capital and built up their business upon the express understanding with the railway companies that they would voluntarily afford all facilities needed by the said express companies, as the representatives of the public for the transaction of their business, or upon the knowledge and belief that the public, whether demanding such facilities in its individual capacity, or through the express companies as its representative, had a legal right to compel the granting thereof by those who had been created by the public, and for the public. Defendant denies that no railway company has ever had the ability to assume as between itself and the public such obligations for the transportation of such express matter as are universally assumed by the express companies towards all who treat them with frankness.

5. Defendant, as to the statements contained in paragraph five of complainant's bill of complaint, denies that

there has been any public demand for the existence and use of an express company as a medium of exchange of money and the collection of negotiable securities and the transportation of express packages of greater or less value, or of packages, the price or value of which was to be collected from the consignee at the time of delivery and remitted to the consignor.

6. As to the statements contained in paragraph six of complainant's bill of complaint, defendant denies that express companies have been created by the public as their instrumentalities for the transmission of public as well as of private moneys, and that the necessity for the existence of such instrumentalities is as great as the necessity for the ordinary *vehicles of commercial intercourse;* denies that in receiving, transmitting and delivering express matter for the public, the express companies act as the agents of the public, giving that attention to the collection, transmission and delivery thereof which neither the public nor the railroad companies can give.

7. As to the statements contained in paragraph seven of complainant's bill of complaint, defendant says it does not know and cannot set forth as to its belief or otherwise whether the same are true or not.

8. Defendant, as to the statements contained in paragraph eight of complainant's bill of complaint, in relation to the equipment and enjoyment of the good will of the Adams Express Company by the said complainant in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and a portion of Tennessee during and since the late civil war, and in relation to the extension and enlargement of complainant's business, and the mode and manner of its conduct of its business therein, and its reputation and stand-

ing, and the extent and value of its business therein, says it does not know and cannot set forth as to its belief or otherwise whether the same as alleged are true or not.

9. Defendant says, as to the statements contained in paragraphs 9, 10, 11, 12 and 13 of the complainant's bill of complaint, that the same are true.

10. Defendant, as to the statements contained in paragraph fourteen of complainant's bill of complaint, admits that the Adams Express Company and said complainant continued severally to enjoy, after the said consolidation of defendant's predecessors into the said St. Louis, Iron Mountain & Southern Railway Co., on the fifteenth day of May, 1874, all the rights, privileges and facilities granted by the two contracts set out in paragraphs eleven and twelve of complainant's bill of complaint until on or about the 1st day of April, 1878; admits that at said last mentioned date the said Adams Express Company, with the assent and permission of defendant, relinquished to the said complainant the transaction of the express business over so much of the lines of defendant as had been embraced in its contract of the thirtieth of April, 1872, with the said Adams Express Company, set out in paragraph eleven of complainant's bill of complaint.

11. Defendant, as to the statements contained in paragraph fifteen of complainant's bill of complaint, denies that for the transportation of its express matter over the lines of the defendant and of its predecessors, the said complainant has paid the sum of $505,761.89, or any amount approximating thereto; denies that a large portion of said amount was paid to said defendant and its predecessors for the transportation of express matter not local over defendant's line, but going to or coming from points beyond the termini of defendant's railroad, and mostly to or from other states of

the Union. Said defendant further denies that the said Adams Express Company during the existence of its relations with defendant paid to it a proportionate amount for similar express service.

12. Defendant, as to the statements contained in paragraph sixteen of complainant's bill of complaint, denies that complainant, relying upon the duty and obligations imposed upon said railroad company by law, and the conditions of the enjoyment of its franchises, as well as by the contract made with defendant and its predecessors to afford to the complainant for a reasonable compensation, equal and indiscriminate opportunities and facilities of transportation of the kind, and to be enjoyed in the manner demanded by the convenience and necessities of the public, and established by the usage and custom of defendant, and all other railroad companies in like cases made large investments of money, in building up its business at stations and along and upon said railroad, and in advertising the same to the public. Denies that by such investments and its energies expended through a long time to secure to the public the facilities of safe and rapid dispatch to any and all places, and to itself the confidence and patronage of the public, it has built, and now owns and enjoys an express business, and prestige and good will thereto upon defendant's line, of great value to the complainant, by reason of the tolls and profits thereby accruing to complainant.

13. Defendant, as to the statements contained in paragraphs seventeen and eighteen of complainant's bill of complaint in relation to the alleged arrangement entered into by complainant with the said Adams Express Company for the general regulation of the transportation of property daily coming from the territory of the one into the territory of the other, and in relation to the interchanges made by said complainant with the said Adams Express Company of

express matter, at various places in the Southern States, and in relation the effect and advantages of such an arrangement and of such interchanges to the public, says that it does not know and cannot set forth as to its belief or otherwise, whether or not the said statements are true.

14. Defendant, as to the statements contained in paragraph nineteen of complainant's bill of complaint denies that the said complainant now owns and controls an express business properly and most expeditiously to be conducted over defendant's railway sufficient to guarantee to the said defendant tolls or earnings in the future as great or greater than those paid it as before stated, to the like pecuniary benefit of the defendant as it has heretofore received.

15. As to the statements contained in paragraph twenty of complainant's bill of complaint, defendant says that for the purposes of this suit it admits the same to be true.

16. Defendant, as to the statements contained in paragraph twenty-one of complainant's bill of complaint, admits that complainant frequently has had occasion to forward over defendant's line large sums of money, but denies that defendant, having its property heavily mortgaged to secure existing debts, affords no adequate or prompt security or indemnity in case of loss therefor. Denies that the safety of complainant and defendant, as well as their convenience has demanded, and that defendant according to the usage of railroad traffic in such cases, has accorded the means and facilities to complainant of forwarding such sums of money in the special care and custody of complainant's own agents. Denies that otherwise complainant would be practically denied the opportunies of safe transportation of said sums of money over defendant's line, intended by the creation of defendant as a common carrier for the public to be afforded to the public.

17. Defendant, as to the statements contained in paragraph twenty-two of complainant's bill of complaint, denies that the interests of complainant and the preservation of its valuable property and good will demand that it shall continue to have and enjoy the daily means and facilities heretofore accorded to it by defendant; denies that complainant for the use and enjoyment thereof has always been ready to pay such just and reasonable compensation, and to conform to such just and reasonable rules and regulations, as may be lawfully required and imposed by defendant. Defendant denies that by reason of the fact of complainant being afforded the facilities accorded to it under the contract aforesaid over defendant's lines, and by force of the statute of the State of Missouri, the duty is imposed upon defendant to always afford to complainant the means and facilities upon its railway of forwarding and transporting in the manner aforesaid by the usage of the express business, upon reasonable terms and regulations, its express matter and messengers.

18. Defendant, as to the statements contained in paragraph twenty-three of complainant's bill of complaint, denies that within a short time before the filing of the bill herein, or at any other time, certain persons have sought and obtained from the legislature, or under the authority of the laws of the State of Arkansas, a charter or other incorporating act for a new express company, call the "Mississippi Valley Express Company," and have perfected the organization of an express company thereunder; denies that any such express company was ever organized under the laws of the State of Arkansas or otherwise.

19. Defendant, as to the statements contained in paragraphs 24, 25 and 26 of the complainant's bill of complaint, admits that the letters and telegrams therein contained are genuine and are correctly set out.

20. As to the statement contained in paragraph twenty-eight of complainant's bill of complaint, admits that the letter set out therein was sent to and received by defendant at or about the time stated therein.

21. Defendant, as to the statements contained in paragraphs 29 and 30 of complainant's bill of complaint, admits the letters therein set out to be true and sent and received as therein stated, but denies that the letter referred to and set out in paragraph twenty-nine was sent to the said Adams Express Company in furtherance of the purpose of giving to the said Mississippi Valley Express Company the exclusive enjoyment of the privileges accorded to the said Adams Express Company, under the contract of April 30, 1872, set out in paragraph eleven of complainant's bill of complaint, and admits that said letter was sent for the purpose of terminating the rights of the complainant under said contract, which it claims to have acquired as the successor and assignee of the said Adams Express Company.

22. As to the statements contained in paragraphs thirty-one and thirty-two of complainant's bill, defendant admits the same to be true.

23. Defendant, as to the statements contained in paragraphs thirty-four, thirty-five and thirty-six of complainant's bill in relation to the transaction of express business by complainant in the States of Alabama and Tennessee, and by the said Adams Express Company in the State of Kentucky, and in relation to the organization of a corporation called the "Union Express Company" by the Louisville and Nashville Railroad Company, and to the giving of a notice to complainant and said Adams Express Company by certain railroad companies therein named to withdraw their business and messengers from the lines of said railroad companies, and in relation to the reasons therefor, and in

relation to the institution of suits by complainant and the said Adams Express Company against certain railroad companies therein named for the protection of the rights of complainant and the said Adams Express Company, and the procuring of restraining orders in said suits against the said railroad companies, and the nature and purport of said orders, says it does not know and cannot set forth its belief or otherwise whether the same are true.

24. As to the statements contained in paragraph thirty-nine of said complainant's bill, defendant denies that said defendant met in conference at Louisville or elsewhere the representatives of the said Louisville & Nashville Railway Company, and of the said four other railway companies mentioned in paragraph thirty-four of complainant's bill of complaint, and then and there confederated together for the purpose of destroying, so far as they could, the express business of complainant and of the said Adams Express Company; denies that they, for that purpose or any purpose, did agree that they would severally terminate their exclusive contracts with the said Mississippi Valley and said Union Express Companies, and would themselves thereafter effect the desired result by assuming an exclusive right to conduct the express business over their several lines of railway, and would not thereafter accord to either complainant or to the said Adams Express Company the facilities and accommodations theretofore granted to them severally, but would exclude therefrom and refuse to transmit the express matter of the said two companies, except upon condition of their surrendering the custody thereof, and of paying such express rates or charges as the said railway companies might severally see fit to adopt.

25. As to the statements contained in paragraph forty-one of complainant's bill, defendant admits the giving of the notice therein set out to complainant and to the said Adams

Express Company, but denies that such notice was given in pursuance of any combination and agreement by and between the defendant and the representatives of the said railroad companies mentioned in paragraph thirty-nine of complainant's bill.

26. Defendant, as to the statements contained in paragraph forty-three of complainant's bill, denies that it is the duty of defendant to continue to afford to complainant upon its passenger trains and at its depots and stations the same facilities which it has heretofore accorded or which it may hereafter accord to itself; denies that under the laws of the State of Missouri the defendant has no lawful power to arrogate to itself the exclusive right of conducting the express business over its lines of railway, or to exclude other express companies from participating therein, or to charge such other express companies such express rates as said defendant may see fit to adopt; denies that defendant by the laws of said State of Missouri is compellable to receive all passengers and express freight from connecting or intersecting roads whenever the same shall be delivered to it, and to take, transport and deliver the same without unnecessary delay, and for such charges, and without any discrimination whether it shall transport such freight in its own name, or in the name of another, and for such toll or compensation therefor as is specifically provided by law, or by the railroad commissioners appointed by law, and annually to transmit to said commissioners a report under oath showing, among other things, what express companies ran on its road, and on what terms and conditions, and the kind of business done by them.

27. As to the statements contained in paragraph forty-five of complainant's bill, defendant admits that the railroad companies have classified railway freight, and that the rate of toll or compensation therefor has been provided by

law, but denies that the same cannot be lawfully exceeded by the defendant in its charges to complainant or to the public.

28. As to the satements contained in paragraph forty-six of complainant's bill, defendant denies that the complainant is in the daily custom of making with its own horses and wagons all the collections and deliveries of express freight as between the public and the railway lines of defendant, which the public cannot conveniently make on its own behalf; denies that the public does not require from defendant any similar service, and that the defendant cannot lawfully charge it therefor.

29. Defendant, as to the statements contained in paragraph forty-seven of complainant's bill, denies that, in answer to the inquiry of complainant on or about the fifteenth day of May, 1880, as to the interpretation defendant intended to place on its communication to complainant of about said time, defendant informed complainant that said defendant would not convey on the trains conveying passengers, baggage and mails, the express matter of complainant, either at the published tariff rates of said defendant, or at the rates prescribed by said railroad commissioners, and that defendant's tariff or express rates had not been fixed; and that before the same would be furnished to complainant, said defendant desired to know what complainant intended to do in reference to the future conduct of its business over defendant's railway.

30. As to the statements contained in paragraph forty-eight in complainant's bill, defendant denies that complainant is entitled to demand and receive from defendant the same facilities and accommodations for transacting the express business over the lines of defendant's railway as may be accorded by said defendant to itself. Denies that it is

entitled to have all its express matter transported over the lines of the defendant's railway, at the rates of freight or toll specifically provided by law, and by the charter of defendant, and by the said railroad commissioners, and upon the same tracks and with like accommodation thereon, and at depots and stations, as the defendant may accord to itself in the transportation of such express matter as it may carry. Denies that defendant, in doing its own express business, can be lawfully required to deduct from the charges to be made by it to the public for the transportation of express matter, upon all express matter transported by it for the said Southern Express Company, a just and reasonable compensation for the accessorial service rendered by the Southern Express Company beyond and off the lines of railway of defendant, in the collection of goods from shippers or consignors, and the delivery of goods to consignees by means of horses and wagons.

31. Defendant states that under its charter of incorporation which was duly granted under and pursuant to the laws of the State of Missouri, on the third day of March, 1851, it is authorized to transport passengers, goods, wares and merchandize of all kinds, and also all kinds of lumber, produce and other articles usually transported on railroads, and to charge and receive such tolls and freights for transportation of persons and commodities on said road or any parts thereof, as shall be to the interest of the same, and that the directors of the defendant are therein authorized to establish such tolls and to alter the same from time to time.

32. Defendant further avers that while it has always claimed the right under the provisions of its said charter to transport what is usually called express matter, and to do a general express business upon and over its own lines—for reasons satisfactory at the time it made the contracts set out

in paragraphs eleven and twelve in the complainant's bill, under and by virtue of which the said Adams Express Company and the said Southern Express Company in its own right, and as the successor of the said Adams Express Company, transacted the said express business over the lines of the defendant until about the first day of June, 1880, when the said contracts were terminated by notice duly given in accordance with the terms and provisions of said contracts.

33. Defendant further avers that since the said first day of June, 1880, the defendant has formed and organized what is known as the "Express Department of the St. Louis, Iron Mountain & Southern Railway Company," and has been and is now receiving, transporting over its lines and delivering freight commonly known as express freight, and is now doing a general express business on its own lines.

34. Defendant avers that the express business, as transacted by the said Southern Express Company, is as much the legitimate business of defendant as any other traffic transported over its lines, and that there is no more need or reason for the intervention of the said complainant between the St. Louis, Iron Mountain & Southern Railway Company and its customers than there is for its intervention in the transportation of lumber or passengers; that it is manifestly unjust to the stockholders of defendant to permit a third party, like the Southern Express Company, to make use of the property of defendant and the services of defendant's employees to carry away a considerable annual profit from the transportation of freight.

35. Defendant further avers that many railroad companies in the United States, some of them for years past, have been transporting all such freight as is usually known as express matter, and have been and are now transacting

over their lines what is commonly denominated a general express business, with as much dispatch and promptness, in as safe and secure a manner, and with greater satisfaction to the public, as the defendant is informed and believes, than the said express companies have been or are now doing.

36. Defendant further avers that the compensation it has received from said complainant for the transportation of its traffic over its lines during the time of the existence and operation of the said contracts before referred to, was insufficient, and afforded no adequate pecuniary benefit to defendant, and that the conduct of complainant in the management and transaction of its business over the lines of defendant, its intervention between defendant and its customers, its retention of the services of the station and freight clerks of defendant, its discrimination in favor of itself by causing the transfer of a large amount of freight to itself that should have been properly carried by defendant, its wilful and continued violations of said contracts, under and by virtue of which it was permitted to do the said express business over the lines of defendant's road, by the concealment and withholding of correct and true reports of the weights of the express freights transported daily by it over defendant's lines—occasioned great damage to defendant and compelled the termination of said contracts by defendant.

37. Defendant further avers that it has been informed and believes that complainant is only entitled to demand of defendant as a common carrier the same rights and privileges in the manner and rates of and for the transportation of its express freight that any other shipper or consignor has; that its rights in the transportation of its express matter spring from the duty of defendant as a common carrier to the public, and that defendant owes to complainant no

other duty than it owes to any other person; that defendant is willing and always has been willing to transport all the freight or express matter of complainant at reasonable rates, and to give to complainant the same facilities and privileges that it grants to any other express company, or to any other person in like circumstances.

38. Defendant further avers that it does not claim and never has claimed a right to exclude the transportation of the express matter of the complainant from the lines of defendant's railway, and has always been willing and is now willing to carry and transport any freight or express matter of complainant that it may offer to defendant. Defendant claims the right to carry and transport what is called express matter in the spaces in its express cars selected by itself, and under the supervision, care and control of its own employees, and has refused and does refuse to complainant the right to have allotted to itself any particular space in defendant's express cars for it, exclusive use, or to permit its messengers to ride in the express cars and to take charge of complainant's express freight.

39. Defendant further avers that whatever expenditure complainant has made in building up its business at the stations and along the lines of defendant, and establishing other and connecting routes for business to be transported beyond the lines of defendant's railroad, has been made by complainant solely in reliance upon the contracts above referred to, and with the knowledge that the same were terminable upon thirty and sixty day's notice. Defendant further avers that the amount expended by complainant in reference to its business along the lines of defendant's railway is inconsiderable, not exceeding in the aggregate $10,000.

40. This defendant denies, all and all manner of unlawful combination and confederacy wherewith it is by the said bill

charged without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of this defendant.

All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

43. And this defendant submits to this honorable court that the complainant has not on its bill shown any case in equity or case entitling it to proceed against defendant in this honorable court, and the defendant prays all such benefit as if it had demurred to the said bill.

THOROUGHMAN & PIKE,
Solicitors for Defendant.

PETITION FOR MODIFIED INJUNCTION.

[OCTOBER 15, 1880.]

Ordered that a rule go against the St. Louis, Iron Mountain and Southern Railway Company, returnable Monday, 20th October, 1880, to show cause why the prayer of the plaintiff's petition hereto annexed should not be granted.

The petition of the Southern Express (Company) respectfully represents:

1. This suit was commenced in May last. The defendant has answered herein, and issue has been joined thereon. By stipulation between the parties the larger portion of the evidence on the part of your petitioner for final hearing has been taken, and your petitioner is proceeding to complete its testimony for such hearing. Your petitioner refers to said pleadings.

2. On the first day of June, 1880, this court granted an injunction herein, according to the prayer of the bill in that behalf, and which was granted in open court, after oral argument, and of which the defendant had due notice and said injunction, yet, and now remains in full force.

3. Said court in granting the said injunction intended, as your petitioner is advised and believes, and therefore charges to secure to your petitioner the full enjoyment of all needful express facilities over the line of the said defendant's railway, as your petitioner had theretofore enjoyed the same, or as the said petitioner was then enjoying or might thereafter enjoy the same.

4. The facilities then being enjoyed by your petitioner consist in free access to the vehicles containing express matter, to the stations and cars of the said defendant, the transportation thereof in the custody of messengers, and, when necessary, in safes and packing trunks or chests in baggage cars, and by passenger trains, and in the collection, unless prepaid, of the express charges due thereon from consignees thereof at the time and place of delivery thereof, and in the payment to the defendant by your petitioner of the amounts due from it for such facilities according to the terms of the contract in said bill set forth, to-wit: "On or

"before the tenth day of each month for the business of "the preceding month."

5. Under the terms of the contracts set out in said bill, your petitioner at the time of the commencement of this suit was paying to the said defendant the sum of one hundred and ninety-five dollars per day as and for its compensation for express services rendered up to a certain limit of pounds of freight per day. In the first of said contracts with the said defendant any excess of weight over and above the limited amount of ten thousand pounds was to be paid for at one and a half of the regular first class freight rates of the defendant as established by its freight tariff. Under the second of said contracts with the Cairo and Fulton Railroad, and the Cairo, Arkansas and Texas Railroad, both now constituting part of the defendant's line, any excess of weight over and above the limited amount of six thousand pounds on any one train was to be paid for at the rate of twenty-five cents per hundred pounds per hundred miles. Your petitioner paid in accordance with the terms of said contracts both as to daily amounts and as to charges on freight in excess of the limited amounts according to the terms of said contracts, and until this suit was commenced. Your petitioner avers that said rates were fixed and determined by the then railroad companies, parties to the contracts, and were an adequate compensation for the services rendered thereunder during the eight or six years during which the said two contracts were respectively in existence.

6. Your petitioner further avers that since the granting of the said injunction the said defendant has undertaken, and is now constantly and persistently endeavoring to defeat the same, and to prevent your petitioner from realizing any beneficial effect or protection therefrom, and to defeat the intention of the court in the issuance thereof, and to deprive your petitioner of the use of the express facilities

aforesaid, or of any beneficial or profitable enjoyment thereof. Your petitioner charges that since the granting of said injunction its spirit and intent have been violated and defeated by the said defendant, and your petitioner has been hereby virtually deprived of all benefit thereof. Your petitioner specifies the following acts which have been and are now being committed by the defendant in violation of the said injunction, and by means whereof your petitioner has been and is now deprived of all benefit therefrom.

The day after the granting of the said injunction the defendant adopted and published a new tariff of express charges to be paid by the public generally for express service upon its line of railroad, including therein the accessorial service performed in collecting by means of wagons and servants, express matter about the cities upon the line of its road, and in carrying the same in the custody of its own messengers and at its own risk, and making personal delivery thereof at destination to the consignees at their respective abodes or places of business, and demanded for the first time of your petioner, and now demands of your petitioner the payment by it of the rate specified in such tariff, declining and refusing to make therefrom, at the demand of your petitioner, a reasonable deduction or abatement for the accessorial service aforesaid, performed by your petitioner through its own instrumentalities, and not accepted from or permitted to be performed by the defendant, and utterly refused, and now refuses to transport the express matter of the public in the charge of your petitioner, except upon the payment by your petitioner to the defendant of a compensation for such accessorial service, although not in fact performed or accepted by it, and at and after their tariff rates aforesaid.

That the said defendant thereafter also demanded for the first time of your petitioner, and yet demands of your petitioner an inspection of the contents of the express matter of the public, entrusted to the custody of your petitioner, to be

transported by it to points of destination, some of which are accessible only over the defendant's line, and placed by your petitioner in the custody of its own messengers upon the express trains of the defendant, upon which the defendant usually and habitually heretofore transported such express matter, and stating for reason the refusal of your petitioner to permit such inspection, against the consent and under the protest of your petitioner threw off from said trains the express matter placed thereon as aforesaid, and wholly failed and refused to transport the same, whereby your petitioner was prevented from performing its duty and obligations to the owners of said express matter in respect to the speedy and safe transportation thereof to destination over the usual and most expeditious route, and your petitioner avers that such inspection was never before allowed by plaintiff, nor was such a demand ever before made upon your petitioner by the defendant, or ever before made upon or conceded by any express company, yet it is now persistently made upon your petitioner, and your petitioner's compliance therewith made a condition upon which alone the defendant would transport the matter of your petitioner.

That the said defendant has refused, for the first time since the issuance of said injunction, to accept the express matter in the charge of your petitioner when the same was contained in sealed packages, destined for points reached by the defendant's line, and also for points in other States beyond the same.

That it has demanded and now demands an inspection of the boxes and trunks and bags of your petitioner, and has asserted and now, for the first time since said injunction, asserts a right to charge upon each package therein separately, irrespective of their aggregate weight, as contained in said boxes, trunks and bags. That it has caused such boxes, trunks and bags to be ejected from its cars, and has refused transportation for the same.

That it has demanded from your petitioner, since the issuance of said injunction and for the first time, prepayment of its charges, according to said tariff rate, before it would transport the express matter in the charge of your petitioner.

That it has ejected your petitioner by force and without notice from offices on the line of its road which your petitioner had theretofore and for a long time previously occupied.

That it has charged the public less rates for express service than said tariff rates, and less than it has charged your petitioner.

That it has instructed its agents, who had theretofore acted as the agents of your petitioner, not to act any longer in its behalf.

That it has required your petitioner to pay fare for its messengers while in custody of express matter on its passenger trains, at and after first-class passenger rates, which was never done prior to said injunction in this cause.

That to divert custom from your petitioner it has persistently made a discrimination as to weights of merchandize presented to them by your petitioner for transportation and by other parties, by estimating the weight of merchantdise presented by other parties at much less than the real weight of said articles, and charging said parties at these estimated weights, and by rigidly and minutely weighing at their full weight the articles presented by your petitioner, and charging them at such full weight.

That to divert custom from your petitioner it has issued free passes to those other than the petitioner having express matter to be transported, which was never done prior to said injunction.

And your petitioner further avers as it is advised and believes that the said express tariff is illegal and that the charges to your petitioner thereunder of rates in accordance therewith is illegal, unjust and unreasonable, that the de-

fendant has no lawful right to inspect the express matter confided to your petitioner or the boxes, trunks or bags in which the same was contained or to refuse to transport the same, or to charge after said tariff rates upon each parcel therein contained, or to eject the same from its cars or to demand pre-payment thereon from your petitioner which it does not demand from the public, or to eject your petitioner from the offices occupied by it at the time of the commencement of this suit, or to charge your petitioner more than it charges the public, or to divert its custom by the issuance of said free passes, and that each and every of said acts is violative of the spirit and intent of the said injunction and destructive of the business of your petitioner.

And your petitioner avers, as it is advised and believes that it was the purpose and intent of said injunction to preserve and continue the relations between your petitioner and said defendant in the precise state and condition in which they were when the same was issued, and that the same and other similar injunctions issued by other courts determine that the Railway Companies owe certain duties to the Express Companies and that the latter have certain rights which the court would protect until the final hearing on full proofs by said court of said causes respectively.

After the commencement of the commission by the defendant of the acts aforesaid your petitioner, by letter, twice requested that the said illegal acts might cease and it hoped and expected that the same would cease, until the court by its final decree herein should have definitely determined the rights of the respective parties hereto. And your petitioner would not now call the attention of the court thereto, had not your petitioner's requests passed unacknowledged and was not its business being absolutely destroyed, thereby.

Your petitioner further avers, as it is advised and believes that it was not the intention of this court to leave the question of the compensation to be paid by it, to the said de-

fendant, to the sole and arbitary decision of the said defendant, but to reserve to itself the sole and only right to judicially determine the same and that such question has been put in issue by the defendant in its answer herein in paragraphs 26, 27, 30, 31, 37 and 38 in the answer herein to which your petitioner refers. and that your petitioner has alredy taken and is now about to take evidence in relation thereto and without a full examination and cross-examination of witnesses having knowledge thereof this court cannot properly be judicially possessed of all the facts and circumstances which should be taken into consideration in determining the same and that such facts and circumstances upon such issue in the case cannot lawfully or properly be brought before the court by *ex-parte* affidavits, nor ought the court to be asked upon an interlocutory application to decide an issue which is properly only to be decided upon final hearing and by final decree.

Your petitioner further avers that precisely the same question of compensation arises and is to be decided in the suits in Indiana and Kentucky in said bill referred to, and in the said suit in the State of Kentucky the plaintiff has taken all its evidence in relation thereto, and that in both of said suits the defendants therein have been required to continue the business in the same manner and to receive the same compensation as had been done before said interference by defendant, and before said injunctions, and that the said plaintiffs are now continuing to pay precisely the same compensation to the railway defendants therein as they were paying at the time when the injunctions therein were respectively issued.

Your petitioner further avers as an evidence as well of the intent of this court, as of the other courts by which similar injunctions have been issued, that the question of compensation should be reserved until it could be decided fully upon the final hearing, that in the case in the Circuit Court of the United States for the District of Colorado, of *Dins-*

more as President of the Adams Express Co. v. *Denver and Rio Grande Railway Co.*, his honor, Judge Hallet stated in his opinion orally delivered at the time of granting an injunction therein and in answer to a question of counsel address thereto as follows:

"I wish to be understood that the matter of compensa-
" tion is open, I only intend to provide that the company
" shall pay at the rate they have been paying during the
" pendency of the suit or until the next term, leaving the
" matter of compensation open. If it should appear that
" you are entitled to more than you now get, we will give
" you more."

And under such decision the said Adams Express Co. has been paying at the rate theretofore paid by it.

And your petitioner further shows that the amount of $195 per day heretofore, and at the time of the commencement of this suit, paid by it, was a just and ample compensation to the defendant for all the express facilities afforded by it to your petitioner; and that such payment has been continuously made during the time covered by the contracts set forth in the bill herein and extended over a period from six to eight years, and that the defendant is not entitled under any aspect of the case to demand or receive, during the pendency of this suit, any increase of compensation for such facilities.

Your petitioner further avers that, at the time when the said two contracts were made, and during the period of six or eight years during which such payment of $195 per day was made, your petitioner was in the sole enjoyment of the conduct of the express business over the said defendant's lines, that shortly prior to the commencement of this suit in May last the said defendant commenced to do an express business over its lines, and is now daily engaged in the conduct thereof, and that thereby the quantity of express matter afforded to your petitioner for transportation has been

diminished, and by consequence the receipts of your petitioner therefrom lessened, and that such fact is proper to be called to the attention of the court in asking for relief in the premises.

Wherefore your petitioner demands, in aid of the injunction already issued herein, that the said defendant may be directed by the court to refrain, during the pendency of this litigation, from preventing or obstructing said plaintiff from continuing and carrying on its said business upon the cars of defendant in the same manner as the same had been done prior to said injunction, and from the further continuance of each and every of the acts aforesaid, or of any similar acts tending to interfere with the business of your petitioner, or its full enjoyment of express facilities on defendants lines, as contemplated by said original injunction.

And that your petitioner shall not be compelled or required, during the pendency of this action, to pay any other or larger sum as compensation for express facilities to be exercised and enjoyed by it than it was paying at the time this injunction was granted, and that your petitioner may have such other, or further, or different relief herein, as to the court may seem meet.

Your petitioner prays that a rule may issue in this cause to defendants to show cause, upon a day to be named by the court, why the prayer of your petitioner herein should not be granted.

S. M. BRECKINRIDGE,
GLOVER & SHEPLEY,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF MISSOURI. } ss.

C. H. Albright, being duly sworn on his oath, states that he has read the above petition, and that the matters and things as therein stated, he believes to be true.

C. H. ALBRIGHT.

Subscribed and sworn to before me this 15th of October, 1880.

A. P. SELBY,
U. S. Commissioner, Eastern District of Missouri.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF MISSOURI. } ss.

I have executed this writ by delivering to Thomas Allen, President of the within named St. Louis, Iron Mountain and Southern Railway Company, a copy of the within petition and rule to show cause at St. Louis, in said district, on the 16th day of October, A. D. 1880.

FELIX COSTE,
U. S. Marshal, Eastern District of Missouri.
By JAMES B. GEGGIE,
Deputy.

ANSWER TO PETITION PRAYING FOR A MODIFIED INJUNCTION.

The defendant, for answer to the plaintiff's petition praying that defendant be required to show cause why it should not be punished for contempt for violating the injunction heretofore issued, says it denies that the intention of the

court when granting said injunction was to leave the plaintiff in the enjoyment of the same facilities on the line of the defendant's road that it had enjoyed before the granting of said injunction, or that it was then enjoying, because by said petition, on which said injunction was granted, it appeared that said plaintiff was doing its business on said road under and by virtue of a contract which had been terminated by the parties; that what the court did say and intend, as the defendant is informed and believes, was that the plaintiff should have and enjoy the same facilities in the conduct of the express business permitted to any other express company, or exercised by the defendant itself, on payment by plaintiff of reasonable compensation therefor, which the defendant says was nothing more nor less, as it is informed and believes, than the law governing the case.

Defendant admits that by the contract set up in the plaintiff's original bill in this cause, certain facilities had been accorded to the plaintiff, among some of which were the right of plaintiff to put a messenger in charge of its safes, packing trunks and baggage, and its right to have such baggage carried on a passenger train, and that it might pay therefor, upon the 10th of each month for the business of the preceding month. Defendant says said rights were accorded to the plaintiff by reason of the terms of said contract, and that said contract had been terminated long prior to the filing of plaintiff's bill, and that plaintiff had and has only such rights as the law compels the defendant to grant to any other express company or shipper upon its line of road.

Defendant admits that under the two contracts set out by plaintiff's bill herein, it was to receive but one hundred and ninety-five ($195) dollars per day for the services it was to render under those contracts for the plaintiff, with the additional compensation for the excess over a given number of hundreds of pounds to be carried for the plaintiff, but defendant denies that said compensation was either reasonable or adequate, but was unreasonably small and inadequate.

for the services aforesaid, and therefore, cannot justly furnish any guide for determining what would now be reasonable compensation for said services, and the said terms having been made by a contract which no longer has any existence or force, cannot be properly pleaded or set up herein.

Defendant denies that since the granting of said injunction it has undertaken, or is now or has at any time or in any manner attempted, or endeavored, to defeat the same and to prevent the plaintiff from realizing any beneficial effects or protection therefrom.

Defendant denies that it has by any act or step, attempted to defeat the intention of the court in the issuance of said injunction, or to deprive the plaintiff of the use of the express facilities, or the profitable enjoyment thereof, accorded to every other person or to itself on the line of its railroad.

Defendant denies that it has defeated or violated the spirit and intention of said injunction by anything whatever done or suffered upon its part, or that it has virtually deprived the plaintiff of all benefits thereunder; but upon the contrary, avers that it has kept and observed, in the most strict faith the spirit and intention of the order of the court.

Defendant says it admits that after the granting of said injunction it made, as it is informed and believes it had a right to do, a list of charges to be paid for express services rendered by it to the plaintiff and all other persons alike using its road; that said list of prices and charges was much smaller than the list of charges theretofore demanded of the public by the plaintiff, and were in all respects reasonable and proper charges for such services, and that the same were purposely by the defendant put at such a rate as to include any and all services of whatever nature rendered by any person using the line of the defendant's road.

Defendant is not clear as to whether it understands the full meaning of the averment as to the "custody of its own messengers" and "at its own risk and in making personal

delivery thereof." If by the allegation under consideration, the plaintiff means to aver that it has been denied the right of custody of its own goods and packages and that its messengers have been deprived of the handling and possession of them, and that the delivery thereof has been taken away from it, then this defendant denies the same, and avers that the said express company has had the custody of its own property and had access to the cars by and through its own messengers; or, if the allegation means that these rights claimed by it have been usurped by the defendant, then the defendant denies each and every one of them.

Defendant denies that it ever has been asked or requested by the plaintiff to make any deduction for any service performed by it whatsoever for or on account of collecting or delivering freight to or from the road, but admits that it would have refused to allow any compensation therefor, because it denies the plaintiff's right thereto.

Defendant denies that it has refused at all, "utterly or otherwise," to transport the express matter of the public in charge of the plaintiff except upon the payment of compensation for accessorial service, although not in fact performed or accepted by it, and at and after their tariff rates aforesaid.

Defendant denies that any demand of or for a rebate for any kind of service performed in gathering or distributing freight has ever been made by the plaintiff upon it, and it denies that the plaintiff is entitled to any such consideration or compensation at its hands.

Defendant denies that it ever has demanded of plaintiff inspection of the contents of its express matter and denies that it ever refused to carry any of its express matter without inspection, except as hereinafter stated.

Defendant denies that it has refused to carry any express matter in the custody of the plaintiff, or by any act of its prevented or interfered with the plaintiff's performance of its duty to the owner of express matter entrusted to its care. Defendant states however that sometime in the forepart of July last it learned that the plaintiff was, for the first time in the use of its road, putting its express matter into boxes, trunks, safes and bags, and in this way shipping through over the line of the defendant articles of great value without rendering to the defendant any adequate compensation for the articles thus carried; that thereupon the defendant requested of the plaintiff to give the value and kind of articles, whether money or other goods, it was thus carrying, so that it might make a reasonable charge for the service it was performing; that the plaintiff upon one occasion refused and neglected, and persisted in such refusal and neglect, to give the defendant a list of the articles and the value thereof, defendant stating at the time to the agents of the plaintiff that it had no objection to carrying such articles, that defendant wanted to carry all the freight plaintiff could bring, but simply wanted to know the value of the articles it was carrying, so that it might regulate its reasonable charges thereon; but yet plaintiff refused, and persisted in its refusal, to furnish the list or the value of the articles then under consideration. Thereupon the defendant did set out of its car the boxes and bags containing the articles aforesaid, which the defendant says, it is informed and believes, it had a perfect right to do under the circumstances; that this is the only case of the sort; that since that time the plaintiff has furnished a list of the articles by it boxed and shipped and the value thereof so far as the defendant knows.

Defendant denies that it ever made the inspection of the articles brought to it for transportation by the plaintiff a condition upon which it would transport the same, and

denies each and every allegation thereof.

Defendant denies that it ever has, under any circumstances whatever, refused to transport anything of any kind for the plaintiff whenever the plaintiff brought it to be transported and would tell defendant what it was and the value of it.

Defendant denies that it ever demanded of the plaintiff to break its packages for the inspection of the agents of the defendant, but has simply asked plaintiff to furnish defendant a list of the articles and the value thereof.

Defendant denies that it has demanded, or is now demanding, an inspection of the contents of the packages of plaintiff, but avers that it has a right to know the contents thereof.

Defendant denies that it has, since the granting of the injunction for the first time, asserted its right to charge for each package irrespective of the weight thereof.

Defendant denies that it ever has ejected from its cars anything whatever belonging to the plaintiff, only in the case above stated, where the plaintiff refused to give a list of the articles or the value thereof.

Defendant says that after the granting of the injunction herein it did not demand prepayment for freight carried by it for the plaintiff for more than four weeks; that it presented its accounts from day to day for carrying the freight of the plaintiff and payment thereof was refused, and defendant so served the plaintiff until its bill amounted to more than the sum of six thousand ($6,000) dollars; that defendant then learned that said plaintiff was utterly insolvent, and had no means within the jurisdiction of this court or elsewhere out of which defendant could collect its bill for the services rendered to the plaintiff; that defendant thereupon demanded, after due notice to the plaintiff, prepayment for all the freight carried thereafter for it,

since which time defendant has, as it had a right to do, as it is informed and believes, demanded of the plaintiff prepayment for the services that defendant was rendering for it.

Defendant denies that it has ejected the plaintiff by force and without notice from offices on the line of its road that the plaintiff had for a long time previously occupied, and says the truth concerning this allegation is that defendant had no more room than was absolutely necessary for the safe, convenient and proper transaction of its own business, and so informed the plaintiff, and the plaintiff thereupon vacated the said rooms.

Defendant denies that it has charged the public less rates for express services than its said tariff rates, and less than it has charged the plaintiff.

Defendant admits that it has instructed its agents who had theretofore acted as the agents of the plaintiff, not to act any longer in its behalf, but says the facts are that the increase of its business demanded the entire time of its agents.

Defendant says that in charging the fare for the messengers it charged only the usual and reasonable rates for such services, which, it is informed and believes, it had a right under the law to charge, and it has gathered the same thing from the order of the court made herein granting the injunction.

Defendant denies that to divert custom from the plaintiff it has issued, or suffered to be issued, or caused or procured to be given out, any pass or passes to persons having express matter to be transported over the defendant's road, but that in all things it has conformed to the injunction herein, and transacted its business with reference to the plaintiff as it did with reference to everybody else,

Defendant denies that its rate of charges is either unreasonable or illegal, but says that the same is in all respects reasonable.

Defendant says it believes as a matter of course that express companies have certain rights which the court will protect.

Defendant denies that the plaintiff ever sent it any one or two letters as alleged in the bill.

In response to the allegation as to the advice the plaintiff has had as to what the court intended in reference to the question of compensation to be be paid by plaintiff, defendant says it has been advised and believes that the intention of the court is clearly expressed in its restraining order granted herein, where it says the defendant is to render to the plaintiff the services required upon payment by plaintiff of reasonable compensation therefor, which the defendant says is the only charge or demand it has made of the plaintiff for any services it has rendered or that it expects to render for the plaintiff.

Defendant does not claim or believe that it has the right to make an oppressive or unreasonable charge against the plaintiff, or any other person demanding like services of defendant.

Defendant admits that all disputes with reference to the tariff or charges involved in this litigation can only be determined at and by a final hearing upon full proof.

Defendant has no sufficient knowledge or information to enable it either to admit or deny what is in dispute in the bills in Indiana and Kentucky, referred to by the plaintiff, nor what the courts have decided thereon, nor what orders were made therein; nor has this defendant any sufficient knowledge to enable it to admit or deny the proceedings had in the case of Dinsmore, President of the Adams Express Company v. the Denver & Rio Grande Railroad Company, nor what was said in said suit by his honor, Judge Moses Hallett, nor what rate was paid to said railroad company for transportation by said express company; but this defendant denies that anything in said petition mentioned as having been done in the cases in Indiana, Kentucky or Colo-

rada is either authority or has binding force upon this court in this cause, and says that the same ought to be stricken out as frivolous.

Defendant denies that one hundred and ninety-five dollars ($195) per day for the service demanded of it by the plaintiff, is at all adequate or a just compensation; that since the said sum was fixed, which was done by contract between the parties, the express business on said road has multiplied more than ten fold, and what was fair compensation under said contract, would be absolutely unjust at the present time.

Defendant denies that by reason of its doing an express business the quantity of express matter offered to the plaintiff has been made less than what it was when said contracts were made, but avers that the increase of business along the line of its road has vastly increased the plaintiff's express business over what it was at the creation of said contracts, notwithstanding the fact that the defendant does an express business itself, which is owing to the vast increase of business, as aforesaid, along the line of defendant's road.

Defendant says that the thing sought to be done by the petition to which this is an answer, is to get this honorable court to readjudicate the question of compensation that the defendant is to charge plaintiff for carriage on defendant's road, and which question was provisionally settled by the court in its order granting the injunction aforesaid, and cannot now be reopened in the manner sought by plaintiff, as defendant is informed and believes.

THOROUGHMAN & PIKE,
Solicitors for Defendant.

A. W. Soper, general superintendent of defendant, makes oath and says that he has read the foregoing answer and knows the contents thereof, and that the matters therein as stated are true of his own knowledge, except those facts

stated upon information and belief, and these he believes to be true.

A. W. SOPER.

Subscribed and sworn to before me, this 25th October, A. D. 1880.

[SEAL.] L. L. WALBRIDGE,
Notary Public, City of St. Louis.

Subscribed and sworn to before me, as interlined, this 25th day of October, A. D. 1880.

A. P. SELBY,
U. S. Commissioner.

MODIFIED INJUNCTION.

The petition of the plaintiff for a modification of the provisional order of injunction heretofore made having been presented to the court, together with the answer thereto, and the affidavits and counter affidavits, and the respective solicitors having been fully heard in the premises, it is ordered that the provisional injunction heretofore made in this case be modified so that the same may read as follows:

The defendants, its agents, employees, and servants, are hereby enjoined, until the final determination of this suit, from preventing the plaintiff from enjoying equal facilities in the conduct of its express business with those permitted to other express companies, or exercised by the defendant itself with respect to said business, on payment by the plaintiff of reasonable compensation for such services as may be rendered in this behalf by the defendants. And it is further ordered that the defendant be enjoined from in-

cluding, under the term 'reasonable compensation,' any accessorial charges, and from making any discrimination against the plaintiff for return of empty kegs or packages, and from charging the plaintiff higher rates of freight than are charged against other express companies, and than it exacts for the service of its own express department—the said rates as to the plaintiff not to exceed those now established by the defendant for like services of other parties, or for the conduct of its own express department. It is further ordered that the defendant be enjoined from preventing the transportation of express matter by the plaintiff over defendant's roads, and from requiring, as a pre-requisite or condition for such transportation, the listing or disclosure by the plaintiff of the contents of the packages by the plaintiff presented to the defendant for transportation, and from preventing the messengers of the plaintiff, on payment of the passenger fare, from like accommodations for the care and custody of plaintiff's shipments, as are accorded to messengers of other express companies, or the agents, servants, or employees of the defendant engaged in like service.

OPINION OF JUDGE MILLER.

IN THE CIRCUIT COURT OF THE UNITED STATES.

EIGHTH CIRCUIT.

WILLIAM B. DINSMORE, Pres. Adams Express Co., &c., *vs.* THE MISSOURI, KANSAS & TEXAS RAILWAY CO.	*District of Kansas.*
SAME *vs.* THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.	*District of Kansas.*
SAME *vs.* THE DENVER & RIO GRANDE RAILWAY COMPANY.	*District of Colorado.*
THE SOUTHERN EXPRESS CO. *vs.* THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.	*Eastern District of Missouri.*
THE SOUTHERN EXPRESS CO. *vs.* THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY.	*Eastern District of Arkansas.*

MILLER, Circuit Justice:

In these cases, argued before me at St. Louis, with Judges McCrary and Treat, I can do no more than present

certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel:

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried, and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that repect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad company shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount so paid.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, &c.

12. I am of opinion that neither the statutes, nor constitutions of Arkansas or Missouri, were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies.

DECREE.

It is by the Court ordered, adjudged and decreed, as follows:

I.—That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, became known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

II.—That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

III.—That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it has to be carried, and to deny them the right to the custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

V. That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well

the transportation of such messengers or agents as of the express matter in their custody and under their control.

VI.—That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880; that such intention and purpose were restrained by the preliminary injunction order of the Court, which said injunction order was afterwards modified, as appears in the record.

VII.—That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent, and upon the same trains that said defendant accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

VIII.—That the plaintiff keep and render monthly a true account of the services performed for it by the defendant, and to pay therefor at the rate hereinafter specified on or before the 15th of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment thereof at the end of every train or in any other manner than as is hereinafter provided; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as is

herein provided, and with surety to be approved by a judge of the court.

IX.—That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff herein specified for a just and reasonable compensation.

X.—Whereas, it is alleged by complainant that since the commencement of this suit, and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon.

XI.—That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars, or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the

said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any manner whatsoever; the said plaintiff paying for the services performed by it for the defendant, monthly as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates, for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals; reserving to either party a right at any time hereafter to apply to this court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

It is further ordered, adjudged and decreed, that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor."

PETITION FOR APPOINTMENT OF MASTER.

At the same March Term of 1882, to-wit, on the 3d day of June, 1882, the Express Company, as appears by the certified copy herewith filed, presented its petition to the said Circuit Court in the words and figures following, to-wit:

"In the Circuit Court of the United States, Eastern District of Missouri.—In Equity—March Term, 1882.—The Southern Express Company, a corporation and a citizen of the State of Georgia, complainant, v. The St. Louis, Iron Mountain and Southern Railway Company, a corporation and a citizen of the State of Missouri, defendant.

In the matter of the reference authorized by the decree of the Court in the above-mentioned cause, entered at the

present Term of the Court, and on the 25th day of March, 1882.

To the Hon. Judges of the Circuit Court of the United States, for the Eastern District of Missouri. In Equity:

(1.) The said Southern Express Company, your petitioner, respectfully states that it was, and is, the plaintiff in the above entitled cause, and filed its original bill therein on the 21st day of May, 1880.

(2.) That in and by said bill it averred and set forth its existence as a corporation and citizen of the State of Georgia, and the existence of the defendant as a corporation and a citizen of the State of Missouri, and that both said plaintiff and defendant were common carriers, as particularly mentioned in said bill, which is here referred to as part of this petition.

(3.) That in said bill it was stated that plaintiff had, for several years previous to the filing thereof, enjoyed the privileges and franchises of its charter as an express carrier over the road of defendant, and desired a continuance of such enjoyment.

(4.) But that the said defendant had notified plaintiff that after May 26th, 1880, it should not continue its business on said road.

(5.) That afterwards, May 15th, 1880, the defendant notified your petitioner that it had "determined to transport all express matter and transact all express business over said road itself, and on its own account, and by and through its own officers and agents, on and after the first day of June, 1880."

(6.) And said plaintiff, in its said bill, further stated it was informed and believed, that the said Railroad Com-

pany intended to exclude it and its express safes and messengers from said railroad, and refuse to accord it, after said June 1st, 1880, any facilities or accommodations for its express business, and that such exclusion would take place unless restrained by order of the Court; and that if it did take place the plaintiff's business over said railroad would be not only irreparably injured, but absolutely destroyed; that its customers and patrons would be lost, its good will and investment rendered worthless, and its ability to keep its contracts with other railway and express companies terminated, and its usefulness to the public, as its servant, destroyed.

(7.) That the plaintiff averred further in its said bill that it was its daily custom to make, with its own horses and wagons and drivers, for whose fidelity it was responsible, all the collections and deliveries of express freight as between the public and the railroad of defendant, which the public could not conveniently make on its behalf, and did not require from defendant, and for which the defendant had no lawful right to charge.

(8.) And said plaintiff further averred in its said bill, that it was lawfully entitled to demand and receive from defendant the same facilities and accommodations for transacting the express business over its lines, as might be accorded by defendant to itself, and to have its express matter transported by defendant at rates or tolls specifically provided by law and the charter of defendant and the Railroad Commissioners, and on the same trains, and with like accommodations at the depots and stations, which defendant might accord to itself in the transportation of express matter by it, and for reasonable compensation. And in the event that defendant should, during the pendency of said suit, or afterwards, undertake to do an express business of its own, it should deduct from charges made by it for trans-

portation of express matter for the plaintiff, a just and reasonable compensation for the accessorial service rendered by plaintiff beyond and off the lines of said railroad in the collection of goods from shippers or consignors, and delivering to consignees, by means of horses and wagons, etc., and which service the plaintiff did not need or require to be done by defendant, but performed for itself. And said plaintiff offered in said bill to pay to defendant, lawful and reasonable rates in its business, and to comply with all reasonable rules of defendant in that behalf.

(9.) And in said bill the plaintiff prayed the court to enjoin the defendant, its officers, agents, servants and employees, until the further order of the court, from interfering with or disturbing the enjoyment by plaintiff of the facilities then accorded to it in the transaction of its business; from interfering with any of plaintiff's express matter or messengers; from excluding or ejecting any of its express matter or messengers from the depots, cars or lines of defendant's road, then enjoyed and occupied by it; from refusing to receive and transport plaintiff's express matter and messengers, as it was then doing, and from disturbing the existing business relations between said plaintiff and defendant.

(10.) That on the hearing of the plaintiff's motion for a preliminary injunction therein, the court, after argument for defendant as well as plaintiff, did then and there "order that the defendant, its officers, agents, servants and employees be enjoined and restrained until the final determination of said cause, from preventing the plaintiff's enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself, on payment, by plaintiff, of reasonable compensation therefor." And defendant then and there had notice thereof.

(11.) That afterwards, on the 21st day of July, 1880, the said defendant filed its answer to said bill, and thereby denied that it was its duty to accord to plaintiff any facilities previously allowed to it on its passenger trains, or at its stations or depots, or such facilities as it accorded to itself; claimed an exclusive right in itself to do all express business over its road, and to exclude plaintiff and all other express carriers from its road, and a right to charge and collect any rate it saw fit; denied that it was bound to receive and transfer freights and passengers from connecting or intersecting railroads; denied that it was bound to make a reasonable deduction for service rendered by the plaintiff and not by itself, to shipments off of its road, from its charge against like shipments when it rendered the same service; and denied the right of plaintiff to have any space on its cars for carrying its express matter, or to carry such matter in the charge of plaintiff's employees, or to have its messengers ride in defendant's cars in charge of its express matter.

(12.) That afterwards, on the ——— day of ——————— the plaintiff filed its general replication to said answer, and afterwards the said parties took and placed on file a large amount of testimony therein, both oral and written, to be read on the hearing thereof.

(13.) That, on November 6th, 1880, the court, on the motion of plaintiff, modified the said preliminary injunction so as to read as follows (being the same order of the 6th of November, hereinbefore set forth.)

(14.) Your petitioner further states that afterwards — viz: March 25th, 1882—such proceedings were had in said cause that the same came on to be heard, and was heard, and thereupon the court entered therein its decree, in the words and figures following, viz: (being the same decree of the 25th March, 1882, hereinbefore set forth.)

All of which, among other things therein, reference being had to the record and proceedings in said cause, will more fully and at large appear.

(15.) Your petitioner now here respectfully prays the court to grant to it the benefit of the reference authorized by sections V. and X. of said decree so entered in said cause, March 25th, 1882.

(16.) Your petitioner respectfully states, that after the making of said orders of injunction by the court, and notice thereof to the defendant, and during the pendency of said bill, the said defendant refused to carry any express matter of said plaintiff on its railroad cars and trains, at a just and reasonable or legal rate of compensation therefor, but demanded and exacted from plaintiff, and required it to pay as a condition precedent to such transportation, excessive, exorbitant, unreasonable and illegal rates; and plaintiff did pay such excessive, exorbitant, unreasonable and illegal rates, to its great wrong and injury.

(2.) That during the whole period last mentioned the said defendant refused to carry the plaintiff's messengers in charge of its express matter on its railway cars and trains at a just and reasonable or legal rate of compensation; but demanded and exacted from the plaintiff, and compelled plaintiff to pay, and plaintiff did pay, as a precedent condition to the transportation of such messengers in charge of plaintiff's express matter, excessive, exorbitant, unreasonable and illegal rates of compensation therefor, to its great wrong and injury.

(3.) That during the whole period aforesaid, the said defendant discriminated against the plaintiff in respect to its charges for transportation of the plaintiff's messengers in charge of its express matter on defendant's railway cars

and trains, denying to plaintiff's messengers the same accommodations extended by it to its own messengers and to others, charging plaintiff for the transportation of its messengers as aforesaid, higher rates for transportation than it charged its own and others, and compelled plaintiff to pay the same as a precedent condition of such transportation, to its great wrong and injury.

(4.) That during the whole period aforesaid, the defendant unjustly discriminated against plaintiff in this; that it carried express matter for itself and others at less rates than it demanded from plaintiff, and compelled plaintiff to pay, for like service, to its great wrong and injury.

(5.) That during the whole period aforesaid, the said defendant unjustly descriminated against the plaintiff in this: that it included in its charges against plaintiff for transportation of its express matter, and compelled the plaintiff to pay to it, compensation for aceessorial service to shipments of express matter off and beyond its railroad cars and trains, not rendered by defendant, but in fact rendered by plaintiff, and just as if defendant had rendered said service, to the great wrong and injury of the plaintiff.

(6.) Your petitioner states that from and after the—— day of——, 1881, and down to March 25th, 1882, the defendant unjustly discriminated against the plaintiff in this: that it refused to allow plaintiff to do its express business over all its trains and express cars, and suffered the plaintiff to do its business only on some of its trains and express cars, thereby putting the plaintiff's express matter twelve hours or more behind the defendant's express matter and that forwarded by it for other persons, thereby driving plaintiff's customers away from it, destroying the good will and favor of the public for plaintiff, and in so far destroying plaintiff's business, to the great wrong and injury of plaintiff.

(7.) That during the whole period from the granting of said injunction and notice thereof to defendant down to the 25th of March, 1882, defendant unjustly discriminated against the plaintiff in this: that it charged plaintiff, and compelled it to pay, as a precedent condition to transportation of its express matter, a greater amount on shipments for a less diftance than it exacted and collected for the transportation of the same class and quantity of goods from plaintiff and others for a greater distance, and compelled the plaintiff to pay the said unreasonable and illegal charges, to its great wrong and injury.

(8.) That during the whole period last mentioned the said defendant unjustly discriminated against the plaintiff in this: that it charged plaintiff, and compelled it to pay, a greater amount as compensation for transportation of plaintiff's express matter over portions of its road, than it charged and compelled plaintiff and others to pay for transportation of similar quantities of the same class of express matter over other portions of its road of equal distance, to the great wrong and injury of plaintiff.

(9.) That said defendant, in all and each of the wrongs and injuries above mentioned, disobeyed and violated the injunctions of the Court in that behalf, in contempt of the authority of the Court and to the great wrong and injury of the plaintiff.

(10.) And in conformity to the terms of said decree, your petitioner respectfully prays that it be referred to a master in chancery to be appointed *pro hac vice* in this particular case, to investigate, examine and report to the Court as provided in said decree and by the rules of the Court what is now and has been since the filing of the said plaintiff's bill, a reasonable rate of compensation to be paid to said defendant by plaintiff for transporting plaintiff's express matter, and messengers in custody and charge thereof,

on the railway trains and cars of defendant, and affording to plaintiff all necessary and reasonable facilities and accommodations for conducting its business in that behalf; the same to be found and established as a unit, including transportation and accommodation for both the express freights and messengers of plaintiff, as aforesaid.

Also to investigate, examine and report, as aforesaid, as to the allegations of wrong and injury aforesaid, and for the purposes aforesaid to use all evidence taken heretofore in said cause and on file therein, both oral and written, and to re-examine the same witnesses, if necessary, and any other witnesses to be produced by the parties, and to conduct the proceedings before him at such times and places as he may designate; and to state an account of the express business conducted by plaintiff over defendant's lines from the filing of plaintiff's said bill to the 25th day of March, 1882; and what amount the plaintiff has paid to the defendant on account of transportation of its express matter and messengers, and accommodations extended to it by defendant during the time last-named, and what amount, if any, has been paid to defendant in that behalf in excess of a reasonable and legal compensation therefor; and what damages the plaintiff has sustained by the wrongs and injuries as aforesaid alleged, and to report to the court all the evidence received by the said master, and all his actings and doings, and, as in duty bound, your petitioner will ever pray.

F. E. WHITFIELD,
GLOVER & SHEPLEY,
S. M. BRECKINRIDGE,
Solicitors for Plaintiff.

C. A. SEWARD,
of Counsel.

In the Circuit Court of the United States, for the Eastern District of Missouri, In Equity, Southern Express Company, plaintiff, v. St. Louis, Iron Mountain and Southern Railway Company, respondent, United States of America, Eastern District of Missouri, sict.:

And now at this day comes Calvin H. Albright, who on his oath states that he was agent of the Southern Express Company for several years immediately preceding January 15, 1882, and since that time to the present time he has been route agent of said Southern Express Company, and now is such route agent; that he has read the annexed petiton of said Southern Express Company, and on his own knowledge the statements in said petition are true in almost the whole scope and extent thereof, and that all said statements are true on information and belief of this affiant, and further saith not.

C. H. ALBRIGHT.

Subscribed and sworn to before me, this 15th day of May, 1882.

[L. S.] VIRGIL M. HARRIS,
Notary Public.

UNITED STATES OF AMERICA, *Eastern District of Missouri.* } ss.

I, M. M. PRICE, Clerk of the Circuit Court of the United States, in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy of petition for appointment of Master *pro hac vice*, in case No, 1667, of Southern Express Company plaintiff, against St. Louis, Iron Mountain and Southern Railway Company, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the City [L. S.] of St. Louis, in said district, this 12th day of October, in the year of our Lord eighteen hundred and eighty-two.

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

ORDER APPOINTING MASTER.

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF MISSOURI. }

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE EASTERN DISTRICT OF MISSOURI.

Be it remembered that on the 5th day of June, A. D. 1882, at a regular stated term of said court, the following, among other proceedings, were had and appear of record, to-wit:

SOUTHERN EXPRESS COMPANY, ... *Plaintiffs,*

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, ... *Defendants.*

Now, at this day come the parties, and the petition of the plaintiff filed herein June 3d, 1882, having been fully considered by the court, it is ordered that there be referred to George H. Shields, Esq., as Master *pro hac vice*, to investi-

gate, examine and report to the court under said decree of March 25th, 1882, pursuant to the rules of the court in such cases provided.

First.—What was, during the period between the injunction order herein of June 1st, 1880, and the 25th day of March, 1882, the rate actually enforced by the defendant against plaintiff for carrying its express freight over such portion of its line as the said plaintiff was allowed to send its express freight over, and what price in addition thereto, if any, it charged for the fares of messengers in charge of said freight, and state an account showing said rates and fares, between said dates, and the amount thereof, respectively.

Second.—What were the statutory rates for carriage of ordinary freights by said defendant during said period, and state an account of the same as applied to the express freight transported by defendant for said plaintiff during said period, as if the same were ordinary freights.

Third.—What was, during the same period, a reasonable compensation to be paid by plaintiff to the defendant for allowing plaintiff all reasonable and proper facilities for conducting plaintiff's business over defendant's road, cars and lines; the same to be found as a unit, including compensation for the transportation both of plaintiff's express matter and messengers in the custody and control thereof; also what amount during the same period the plaintiff was required to pay, and has paid to the defendant in that behalf; and if the amount so paid by plaintiff has exceeded such reasonable compensation to state an account thereof,

Fourth.—Whether, during said period, defendant included in its charges for transportation of express matter for plaintiff, charges also for accessorial service not performed by said defendant but performed by plaintiff for itself.

Under the term 'accessorial' service, as herein used, the Master will include only the costs and expenses of collecting and delivering express matter to the respective railroad depots or stations for transportation by defendant on its road and cars, and of delivering such express matter on the arrival of the same at the place of destination to the consignees there of at any other place than at its depots or stations, respectively.

Fifth.—Whether, during the period aforesaid, the defendant required plaintiff to pay, and plaintiff paid, for transportation of its messengers in custody of its express matter other than usual passenger fares; and whether, during the same period, defendant has discriminated against plaintiff by transporting express messengers other than plaintiff's at less rates than it compelled plaintiff to pay, and if so, to state an account of the excess paid by plaintiff over either of said rates.

Sixth.—And whether during the same period defendant discriminated against plaintiff by charging and compelling plaintiff to pay for transportation of its express matter, higher rates and greater amounts than it charged others for the same and similar services; and if so, to state an account of the amount of money by means of such discrimination so paid or required to be paid by plaintiff above the rates so allowed to others than plaintiff for such service.

Seventh.—Whether, during the period aforesaid, the defendant discriminated against plaintiff by refusing to allow plaintiff to conduct its business on any of defendant's lines, trains and express cars in use during said period, on which defendants and others conducted express business while plaintiff was so excluded, and whether by such exclusion of plaintiff and its business its express matter and messengers were hindered and delayed, and plaintiff was thereby

prevented from competing with defendant and others conducting express business over said lines; and if so, what damages, if any, were sustained by plaintiff in its business, and state an account thereof.

Eighth.— It is further ordered that, for the purposes of the reference hereby directed, the master is to use all evidence on file in this cause, and any other produced by the parties, and re-examine the same witnesses, if necessary, and any other witnesses produced by the parties, and conduct the proceedings before him at such time and places as he may designate, on due notice to the respective parties, and report his findings and all the evidence taken before him.

108-24

Supreme Court of the United States.

OCTOBER TERM, 1882. Nos. 879, 914 and 994.

THE MEMPHIS AND LITTLE ROCK R. R. CO.,
Appellant,

vs.

THE SOUTHERN EXPRESS CO.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. R. CO.,
Appellant,

vs.

THE SOUTHERN EXPRESS CO.

THE MISSOURI, KANSAS AND TEXAS R. R. CO.,
Appellant,

vs.

WM. B. DINSMORE, AS PRESIDENT, &C.

MOTIONS TO DISMISS.

BRIEF FOR APPELLANTS.

DILLON & SWAYNE.

BURGOYNE, Law Case Printer, (Law Telephone 587), 57, 59 & 61 Park Street, N. Y.

In the Supreme Court of the United States.

[No. 914.]

SOUTHERN EXPRESS CO.,
Appellee,

vs.

ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILROAD COMPANY,
Appellant.

MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLANT.

I. For an analysis of the bill and answer we refer the brief of our associate counsel, Messrs. Broadhead and Hauessler. It is unnecessary for us to go over the same ground, and we shall add but little in the way of argument to what they have so well said. It may be well, however, to add a few remarks.

The point before the Court is, shall the appeal be dismissed?

The solution of that question depends upon the elements and character of the decree.

The Act of Congress upon the subject declares that "an appeal shall be allowed to the Supreme

"Court from all *final decrees* of any Circuit Court, "or of any District Court sitting as a Circuit Court, "in cases of equity and of admiralty and maritime "jurisdiction, where the matter in dispute exceeds "the sum or value of two thousand dollars, and the "Supreme Court is required to hear and determine "such appeals."

Rev. Stat. U. S., Vol. 1, Sec. 192.

There is no question that the matter here in dispute largely exceeds "the sum or value of two thousand dollars."

II. The Decree.

We deem it best to give the decree in full. Those parts to which we desire particularly to call the attention of the Court—being those most material to be considered—are specially numbered, and the numerals are in brackets.

"It is by the Court ordered, adjudged and decreed as follows:

"I. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

"II. That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messenger or agent of such express company.

"III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and rail-

roads for the transportation of such property so under the control of such messengers or agents.

"IV. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof, unless such inspection be granted or such knowledge be afforded.

"V. That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

"VI. That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880; that such intention and purpose were restrained by the preliminary injunction order of the Court, which said injunction order was afterwards modified as appears in the record.

"VII. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself; or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

(**No. 1**) "VIII. *That the plaintiff keep and render monthly, a true account of the services performed for it by defendant, and pay therefore at the rate hereinafter specified*, on or before the 15th of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond

in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as are herein provided, *and with surety to be approved by a Judge of the Court.*

" IX. That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff as herein specified for a just and reasonable compensation.

(**No. 2**) " X. Whereas it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

(**No. 3**) " XI. That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner, the enjoyment by the plaintiff of the facilities provided for in this decree to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff, and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant monthly as herein prescribed, at a

rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, reserving to either party the right at any time hereafter to apply to this Court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

(**No. 4**) "It is further ordered, adjudged and decreed that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor."

III. Remarks and authorities.

("No. 1.") *Section VIII of the decree.*

This clause, it will be observed, takes the business of the appellant wholly out of its hands. Its rights are disregarded. The proceeding is entirely one-sided. The account is to be kept by the *debtor*—not by the *creditor*. The bond for *future payment* is to be given by the debtor and approved by a judge. The creditor is to be bound as to both, and there is no provision that he shall be heard as to either.

But the most material point is that the decree in this respect is as "*final*" (to use the term employed in the statute) as language can make it. There is no limitation in point of time—nor any other condition or qualification whatsoever.

("No. 2.") *Section X of the decree.*

The previous recitals decide all the legal points involved in the case, *finally* and conclusively in favor of the appellee;

The appellee is to be the moving party. The appellant can neither move nor compel the appellee to move.

The appellee may choose never to move, and if so, according to the contention of the other side, the Railroad Company could never appeal.

But there are other answers which we think conclusive:

(1) The recitals show that the whole law of the case had been decided in favor of the Express Company.

(2) The matter thus provided for was merely collateral and incidental to the vital points so decided.

(3) If the decision of the Court below should be reversed, the inquiry provided for could not and would not be made. If made before the reversal, its results in that event, even if favorable to the appellee, would be an utter nullity.

Then why incur the expense and delay involved in making it until the fundamental question of the right to make it is decided by the Appellate Court?

(4) If the judgment of the Appellate Court in this case should be adverse to the apellant, and the enquiry should be thereafter made—whatever the result—either party would have the right to appeal. This is settled in Blossom vs. the Railroad Co., 1 Wall., 655. That case was an appeal by a purchaser under a decree in equity. See also Supervisors vs. Kennicut, 94 U. S. R., 498; Hickley vs. Gilman, Id., 467; *Ex parte* Jordan, Id., 248; Mills vs. Hoage, 7 Paige, 17.

As well might it have been contended in the case first cited that the original decree could not be appealed from until the sale had been made and confirmed or set aside, as to insist here upon what is contended for by the appellee.

The rule is that nothing settled by the Appellate

Court can be gainsaid, but that anything done subsequently by the Court below—outside of that scope—and not being merely ministerial or matter of detail or discretion, may be made the subject of review by another appeal.

(See Blossom vs. Railroad, *supra*).

Justice and reason require this.

The second appeal may be as important to the party appealing as the first one was to the party appealing in that case.

("No. 3.") Section 11 of the decree.

It declares: "That the defendant, its officers, agents, servants and employees and all persons acting under their authority, be and they hereby are *permanently and perpetually* enjoined and restrained from interfering with or disturbing in any manner," &c.

The qualification reserves "to either party the right at any time hereafter to apply to this Court" * * * "for a modification *as to the measure of compensation herein prescribed.*"

The whole law of the case having been already decided in favor of the Express Company, here, "permanently and perpetually" by injunction, all that the Express Company sought by its bill is *finally* and expressly given to it.

The right to apply for a modification is carefully limited to "the measure of compensation."

Does this affect the *finality* of the decree? *Non constat* that either party will ever so apply. Can it be that the *finality* depends upon the volition of the parties, and notupon the act of the Court, and that the decree is final if such application be not made, and not final if it be made?

But the answer upon which we rely is, the propo-

sition upon which we have all along insisted; that the decree settles *finally* the entire rights of the parties, and disposes *finally* of the entire merits of the case, and that this matter is immaterial to that view of the subject.

("No. 4.") It is declared at the foot of the decree, that the appellant shall pay the costs, "and that an execution or fee bill shall issue therefor."

We think it is difficult to imagine how a decree can be *more final* than this one.

If the appeal be dismissed, the appellant will, of course, proceed at once to collect the costs. That being done, we do not see that anything remains for him to do but to sit down quietly and enjoy "permanently and perpetually" the fruits of his victory.

The Court will readily perceive the motive of one party to have a hearing here as early as may be, and of the other to postpone it as long as possible.

The first adjudication of this Court as to what is *a final decree* was made in Ray vs. Law, 3 Cr., 179. Chief Justice Marshall speaking for the Court, there said: "This Court is of the opinion that a decree for a sale under a mortgage is a final decree and may be appealed from.

Such has been the doctrine of this Court ever since.

Forgay vs. Conrad, 6 How., 204, is particularly deserving of attention. The opinion was delivered by Chief Justice Taney. It was evidently prepared with the greatest care and consideration. We hazard nothing in saying that it is the most authoritative adjudication of this Court upon the subject. It has not been impugned by any later judgment. Its parallelism to the present case as regards the point un-

der consideration is so exact and complete that we think that this appeal can not be dismissed without overruling directly that authority.

That case was a creditor's bill. The complainant was the assignee of a bankrupt. The Court found that certain transfers of lands and slaves were fraudulent and void, and decreed that all the property should be delivered up to the assignee. The opinion says: "The decree then directs that the master take an account of the profits of the land and slaves ordered to be delivered up, from the time of the filing of the bill until the property was delivered, or to the date of the master's report," * * * * and concludes in the following words: "and so much of said bill as contains or relates to the matters hereby referred to a master for a report, *is retained for further decree in the premises*," * * * "*and that the said defendants do pay the costs.*" It is said further in the opinion (p. 204) "and according to the last paragraph in the decree, *the bill is retained merely for the purposes of adjusting the accounts referred to the master.*"

It will be observed the present case is a stronger one for an appeal than that one. In ours there is no *requirement* that either party shall do anything, and there is no certainty that either will ever avail himself of the license given by the decree.

On the same page the Chief Justice says, further: "When the decree decides the right to the property in contest, directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried *immediately* into execution, the decree must be regarded a *a final one* to

that extent, *although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.*"

In our case the decree executed itself *eo instanti* that it was made "permanently and perpetually" by an injunction, and required furthermore that execution should issue for the costs.

We think we have shown the parallelism upon which we insist.

In Thompson vs. Dean, 7 Wall., 346, Chief Justice Chase, speaking for the Court, said: "We think the current of authority fully sustains the rule laid down by the late Chief Justice, in the case of Forgay vs. Conrad, which we again declare in his own language." He then quotes the rule from that case as we have quoted it, *supra.*

"Unquestionably the whole law of the case was settled by the Chief Justice on that decree—and as nothing remains *to be done unless a new application shall be made at the foot of the decree, the Court is of opinion that the decree is a final* one, as it has conclusively settled all the legal rights of *the parties involved in the proceedings.*"

(Opinion of the Court by Mr. Justice Clifford)—French vs. Shoemaker, 12 Wall., 98.

This applies with full force to the case in hand.

"It is not unusual in courts of Equity to enter decrees determining the rights of the parties and the extent of the liability of one party to the other, giving at the same time the right to apply to the Court for modifications and directions. *It has never been doubted that such decrees are final.*"

Stoval vs. Banks, 10 Wall., 587.

"A decree with such a liberty reserved is still a final decree, and when signed and enrolled, may be pleaded in bar to another suit for the same matter."

2 Daniells Ch'y. Prac., 641, 642.

"A decree is not the less final in its nature because some future orders of the Court *may possibly* become necessary to carry such decree into effect."
Mills vs. Hoag, 7 Paige, 19.

The argument of the other side, pushed to its consequences, would maintain the proposition that if one be condemned to the gallows or the penitentiary, there can be no hearing upon error until the sentence is executed.

A delay of justice is to that extent a denial of justice. In many instances there is a large expenditure of both time and money which the final result shows to have been thrown away. We refer particularly to a certain class of patent right cases. The rule of appealability should be construed in the light of these considerations. We think this is the wisest policy and would best subserve the ends of justice.

DILLON & SWAYNE,
Of Counsel for the Appellant.

NOTE.

We are of counsel for the appellants in cases No. 994 and 879, in each of which there is also a motion to dismiss the appeal. This brief is intended for those cases as well as for the one named in it.

D. & S.